(26,333)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 360.

W. A. HANCOCK ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY OF MUSKOGEE, OKLAHOMA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, Oklahoma, this the 5th day of February, A. D., 1918.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR.,
Deputy.

b Filed in Supreme Court of Oklahoma Jan. 28, 1918. William M. Franklin, Clerk.

Citation.

THE UNITED STATES OF AMERICA:

To the City of Muskogee, Oklahoma; Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, thirty days from and after the date this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Oklahoma, wherein W. A. Hancock, and others, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mention- should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable J. F. Sharp, Chief Justice of the Supreme Court of Oklahoma, at Oklahoma City, the capital of said State, this 23rd day of January, 1918.

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Attest:
WM. M. FRANKLIN,
Clerk,
By JESSIE PARDOE,
Deputy.

Service accepted this 28 day of January, 1918.

GIBSON & HULL,
CHAS. A. MOON,
Attorneys for Defendants in Error.

1 Filed in Supreme Court of Oklahoma Jan. 23, 1918. William M. Franklin, Clerk.

In the Supreme Court of the United States.

W. A. HANCOCK, W. L. HOFFMAN, S. F. STEVENS, J. C. WELCH, Jeanette Langenberg, O. E. Swan, Isiah Davis, F. Simpson, C. F. Meadors, P. A. Gavin, H. W. Bly, W. A. Wilson, John W. Brown, Grant Brown, W. D. Brewer, William Ragsdale, J. L. Huff, Edith H. Brainard, Emma Weiland, Mrs. P. J. Burlingame, Henry Stebbins, A. H. Sharum, J. N. McEntee, P. L. Snyder, Bessie Rowley, N. K. Farmer, John J. Moore, E. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Alice Smith, Anderson Stewart, Franklin Garland, Robert Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Bills, C. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, W. B. Pearson, Ida Grant, Elizabeth Cook, C. F. Bullard, F. P. Sager, C. A. Thompson, J. B. Parks, S. H. Young, J. A. Mell, Margaret Nagle, Ben H. Brown, W. H. Kramer, W. C. Garret, L. S. Copeland, W. H. Rairden, Susan Chabbourn, L. E. Tomm, J. L. Havis, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora F. Moorer, M. M. Lane, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Dotty, E. Page, C. B. Finnigan, Muskogee National Bank, C. N. Collins, C. M. Fullenweider, R. S. Marshall, Bent Cobb, J. B. Fue, J. W. Morton, Rubin Mayo, Lida B. Jobe, J. M. Brucker, G. E. Burford, H. H. Atkins, Sadie M. Lovell, L. F. Flamm, Una H. Tevis, J. M. Stout, C. J. Eddy, Ben Hall, H. L. Jolly, O. F. Beebe, Grant Foreman, Mrs. Pulliam, W. S. Bullard, Ophelia King, L. P. Bullard, John F. Smith, Fred J. Wilkemyer, J. P. Nichols, H. W. Gibson, U. L. Jackson, Wood Hurt, Guy Morrison, H. H. Carter, A. F. Hubbert, E. W. Smart, W. R. Emerson, Muskogee Gas and Electric Co., American National Bank, Presilla Mackey, W. J. Quarles, D. H. Linebaugh, W. L. Biggs, F. E. Coss, J. M. Miller, Chas. Nelson, M. L. Gerton, C. T. West, C. A. Lockard, W. P. Fields, Washington Loan and Trust Company, Rachel Slagel, Ella Mallow, J. H. Melton, and Midland Valley Railroad Company, a Corporation; W. W. Bibb, Rachel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey, J. E. Lyles, R. T. Payne, J. E. Winan, W. M. Newbold, C. M. Whaley, Earnest Price, Molly Luther, W. H. Carson, Thomas Kennedy, J. H. Kennedy, P. E. Heckman, Ward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcomb, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. W. Franklin, W. P. Fields, J. W. Quarles, A. C. Raymon, Robert Wrigley, Martha J. Moore,

Charles Nelson, Alma Leach, Vin Truman, L. E. Sperry, J. A. Wright, John W. Morton, E. J. Hodges, W. B. Riley, Hugh A. King and Ralph E. Campbell, Plaintiffs in Error,

vs.

THE CITY OF MUSKOGEE, OKLAHOMA; FRANKLIN MILLER, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, Defendants in Error.

2 *Petition for Writ of Error.*

Comes now W. A. Hancock, one of the Plaintiffs in Error above named, and the other Plaintiffs in Error above named, and show unto this Honorable Court that in the Record and proceedings and rendition of decree and judgment in the above cause by the Supreme Court of the State of Oklahoma, it being the highest Court of said state in which a decision could be had on the said suit between said Plaintiffs in error in said cause, as shown in the caption thereof, and the Defendants in error,—The City of Muskogee, Oklahoma, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma,—manifest error has occurred greatly to their damage whereby petitioners, the said Plaintiffs in Error, feel aggrieved.

That in the record and proceedings it will appear that there was drawn in question the validity of certain statutes of the State of Oklahoma, on the ground of repugnancy to the constitution of the United States, and the decision was in favor of the validity of said laws of said state; and there was also drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege, or exemption specially set up and claimed under such clause of the Constitution of the United States; that the federal question particularly involved in said cause, and which was decided adversely to the Plaintiffs in Error was that Sections 984 to 993, inclusive, Snyder's Compiled Laws of 1909, of Oklahoma, and being an Act of the Legislature of the State of Oklahoma of the 1903 Session of the General Assembly of said state, and entitled "An Act authorizing municipal Corporations to Extend or Build General Sewer Systems, and to Levy Special Assessments of Taxes to pay for Same", is in conflict with the Fourteenth Amendment to the Constitution of the United States in that proceedings under such statutes amount to and are a taking of the property of the Plaintiffs in Error without due process of law, and a denial to the said Plaintiffs in Error of the equal protection of the laws; all

3 of which is fully apparent in the records and proceedings of the case, and specifically set forth in the assignment of errors filed herewith.

Wherefore Petitioners pray that their Proceeding in Error and Writ of Error be allowed, and that a transcript of the record, proceed-

ings, files and Papers upon which said orders, judgment, and decision were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of the said Court in such case made and provided, that the same may be inspected and corrected as according to law, and justice should be done.

B. B. BLAKENEY,
J. H. MAXEY,
Attorneys for Plaintiffs in Error, of Tulsa, Okla.

4 Filed in Supreme Court of Oklahoma, Jan. 23, 1918. William M. Franklin, Clerk.

In the Supreme Court of the United States.

W. A. HANCOCK, W. L. HOFFMAN, S. F. STEVENS, J. C. WELCH, Jeanette Langenberg, O. E. Swan, Isiah Davis, F. Simpson, C. F. Meadors, P. A. Gavin, H. W. Bly, W. A. Wilson, John W. Brown, Grant Brown, W. D. Brewer, William Ragsdale, J. L. Huff, Edith H. Brainard, Emma Weiland, Mrs. P. J. Burlingame, Henry Stebbins, A. H. Sharum, J. N. McEntee, P. L. Snyder, Bessie Rowley, N. K. Farmer, John J. Moore, E. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Alice Smith, Anderson Stewart, Franklin Garland, Robert Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Bills, C. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, W. B. Pearson, Ida Grant, Elizabeth Cook, C. F. Bullard, E. P. Sager, C. A. Thompson, J. B. Parks, S. H. Young, J. A. Mell, Margaret Nagle, Ben H. Brown, W. H. Kramer, W. C. Garrett, L. S. Copeland, W. H. Rairden, Susan Chabbourn, L. E. Tomm, J. L. Havis, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora F. Moorer, M. M. Lane, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Dotty, E. Page, C. B. Finnigan, Muskogee National Bank, C. N. Collins, C. M. Fullenweider, R. S. Marshall, Bent Cobb, J. B. Fue, J. W. Morton, Rubin Mayo, Lida B. Jobe, J. M. Brucker, G. E. Burford, H. H. Atkins, Sadie M. Lovell, L. F. Flamm, Una H. Tevis, J. M. Stout, C. J. Eddy, Ben Hall, H. L. Jolly, O. F. Beebe, Grant Foreman, Mrs. Pulliam, W. S. Bullard, Ophelia King, L. P. Bullard, John F. Smith, Fred J. Wilkemyer, J. P. Nichols, H. W. Gibson, U. L. Jackson, Wood Hutt, Guy Morrison, H. H. Carter, A. F. Hubbert, E. W. Smart, W. R. Emerson, Muskogee Gas and Electric Co., American National Bank, Presilla Mackey, W. J. Quarles, D. H. Linebaugh, W. L. Biggs, F. E. Coss, J. M. Miller, Chas. Nelson, M. L. Gerton, C. T. West, C. A. Lockard, W. P. Fields, Washington Loan and Trust Company, Rachel Slagel, Ella Mallow, J. H. Melton, and Midland Valley Railroad Company, a Corporation; W. W. Bibb, Rachel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey,

J. E. Lyles, R. T. Payne, J. E. Winan, W. M. Newbold, C. M. Whaley, Earnest Price, Molly Luther, W. H. Carson, Thomas Kennedy, J. H. Kennedy, P. E. Heckman, Ward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcomb, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. W. Franklin, W. P. Fields, J. W. Quarles, A. C. Raymon, Robert Wrigley, Martha J. Moore, Charles Nelson, Alma Leach, Vin Truman, L. E. Sperry, J. A. Wright, John W. Morton, E. J. Hodges, W. B. Riley, Hugh A. King and Ralph E. Campbell, Plaintiffs in Error,

vs.

THE CITY OF MUSKOGEE, OKLAHOMA; FRANKLIN MILLER, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, Defendants in Error.

5 *Assignment of Error.*

Comes now W. A. Hancock, and each of the above named plaintiffs in error in the above styled cause, and files the following assignments of error on writ of error from the order, decision and judgment of this court, dated the 6th day of November, 1917.

I.

That this Honorable Court erred in overruling the petition for re-hearing filed in said cause.

II.

That the said Honorable Court erred in not reversing the judgment and decision of the District Court of Muskogee County, State of Oklahoma, as prayed for, and the petition in error filed in the said cause in the Supreme Court of said State.

III.

That this Honorable Court erred in affirming the said judgment of the District Court of Muskogee County, State of Oklahoma.

IV.

That the said Honorable Court erred in refusing to make the temporary injunction permanent which had theretofore been granted by the said District Court of Muskogee County against the defendants in error.

V.

That said Honorable Court erred in holding that the proceedings of the Mayor and Commissioners of the City of Muskogee, the defendants in error, which were fully set forth in the plaintiffs' peti-

tion and amendments thereto, filed in the said District Court of Muskogee County, constituted due process of law as to the
6 plaintiffs in error within the meaning of the Fourteenth Amendment to the Constitution of the United States.

VI.

This Honorable Court erred in holding that the plaintiffs in error were not deprived of their property by the proceedings attempted to be taken under and by virtue of Sections 984 to 993 inclusive of Snyder's Compiled Laws of Oklahoma, 1909, being an act of the Legislature of the 1903 General Assembly of the State of Oklahoma, entitled: "An Act authorizing Municipal Corporations to extend or build General Sewer Systems and to Levy Special Assessments of Taxes to pay for same," without due process of law as provided by the Fourteenth Amendment to the Constitution of the United States.

VII.

That this Honorable Court erred in holding that the statutes and laws of the State of Oklahoma, providing for the manner of giving notice to the property owners as to the proposed sewer improvements and the letting of contracts therefor, and the assessment of benefits to said property owners as provided by the said Sections aforestated, constituted as to such property owners due process of law within and as provided by the Fourteenth Amendment to the Constitution of the United States.

VIII.

That this Honorable Court erred in affirming the judgment of said District Court of Muskogee County in holding that the petition of the plaintiffs in error and amendments thereto did not state facts sufficient to constitute a cause of action in favor of the plaintiffs in error and against the defendants in error and in holding that the said facts stated and alleged in said petition and amendments thereto did not entitle the plaintiffs in error to a permanent injunc-
7 tion enjoining and restraining the enforcement and collection of such taxes attempted to be imposed, levied and collected on the properties of the plaintiffs in error, and in refusing to grant a petition for re-hearing from its decision thereon.

IX.

That this Honorable Court erred in not reversing the judgment and order of the District Court of Muskogee County in sustaining the demurrer of the defendants in error to the petition and amendments thereto of the plaintiffs in error and in overruling the petition for re-hearing filed in this court.

X.

This Honorable Court erred in not reversing the order and judgment of the District Court of Muskogee County, dismissing the peti-

tion and amendments thereto by the plaintiffs in error for want of equity after the plaintiffs in error had elected to stand thereon, and refusing to plead further, upon the grounds that the said facts so stated in said petition and the amendments thereto did not show that the proceedings attempted to be enjoined was in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, the aforesaid W. A. Hancock, and the other said plaintiffs in error, pray that the said judgment, decision and errors be reversed and a writ of error be granted and allowed by the Supreme Court of the United States.

B. B. BLAKENEY,
J. H. MAXEY,
Attorneys for Plaintiffs in Error.

8 Filed in Supreme Court of Oklahoma, Jan. 23, 1918. William M. Franklin, Clerk.

In the Supreme Court of the United States.

W. A. HANCOCK, W. L. HOFFMAN, S. F. STEVENS, J. C. WELCH, Jeanette Langenberg, O. E. Swan, Isiah Davis, F. Simpson, C. F. Meadors, P. A. Gavin, H. W. Bly, W. A. Wilson, John W. Brown, Grant Brown, W. D. Brewer, William Ragsdale, J. L. Huff, Edith H. Brainard, Emma Weiland, Mrs. P. J. Burlingame, Henry Stebbins, A. H. Sharum, J. N. McEntee, P. L. Snyder, Bessie Rowley, N. K. Farmer, John J. Moore, E. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Alice Smith, Anderson Stewart, Franklin Garland, Robert Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Bills, C. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, W. B. Pearson, Ida Grant, Elizabeth Cook, C. F. Bullard, F. P. Sager, C. A. Thompson. J. B. Parks, S. H. Young. J. A. Mell, Margaret Nagle, Ben H. Brown, W. H. Kramer, W. C. Garrett, L. S. Copeland, W. H. Rairden, Susan Chabbourn, L. E. Tomm, J. L. Havis, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora F. Moorer, M. M. Lane, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Dotty, E. Page, C. B. Finnigan, Muskogee National Bank, C. N. Collins, C. M. Fullenweider, R. S. Marshall, Bent Cobb, J. B. Fue, J. W. Morton, Rubin Mayo, Lida B. Jobe, J. M. Brucker, G. E. Burford, H. H. Atkins, Sadie M. Lovell, L. F. Flamm, Una H. Tevis, J. M. Stout, C. J. Eddy, Ben Hall, H. L. Jolly, O. F. Beebe, Grant Foreman, Mrs. Pulliam, W. S. Bullard, Ophelia King, L. P. Bullard, John F. Smith, Fred J. Wilkemyer, J. P. Nichols, H. W. Gibson, U. L. Jackson, Wood Hurt, Guy Morrison, H. H. Carter, A. F. Hubbert, E. W. Smart, W. R. Emerson, Muskogee Gas and Electric Co., American National Bank, Presilla Mackey, W. J. Quarles, D. H. Linebaugh, W. L. Biggs, F. E. Cross, J. M. Miller, Chas. Nelson, M. L. Gerton,

C. T. West, C. A. Lockard, W. P. Fields, Washington Loan and Trust Company, Rachel Slagel, Ella Mallow, J. H. Melton, and Midland Valley Railroad Company, a Corporation; W. W. Bibb, Rachel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey, J. E. Lyles, R. T. Payne, J. E. Winan, W. M. Newbold, C. M. Whaley, Earnest Price, Molly Luther, W. H. Carson, Thomas Kennedy, J. H. Kennedy, P. E. Heckman, Ward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcomb, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. W. Franklin, W. P. Fields, J. W. Quarles, A. C. Raymon, Robert Wrigley, Martha J. Moore, Charles Nelson, Alma Leach, Vin Truman, L. E. Sperry, J. A. Wright, John W. Morton, E. J. Hodges, W. B. Riley, Hugh A. King and Ralph E. Campbell, Plaintiffs in Error,

VS.

THE CITY OF MUSKOGEE, OKLAHOMA; FRANKLIN MILLER, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, Defendants in Error.

9 *Order for Allowance of Writ of Error.*

On this 23 day of January, A. D. 1918, came on to be heard the application of W. A. Hancock, and others, as plaintiffs in error, all of whom are named in the caption herein as plaintiffs in error, said plaintiffs in error being represented by counsel, for a writ of error, and it appearing to the court from the petition filed herein and the record filed therewith that the application ought to be granted, and that a transcript of the record, proceedings and papers upon which the judgment of the court was rendered, properly certified should be sent to the Supreme Court of the United States as prayed for in the petition, that such proceedings may be had as will be just in the premises,

It is therefore ordered that the writ of error be allowed upon the plaintiffs giving bond, conditioned as the law directs, in the sum of Twenty-five Hundred Dollars ($2500.00), which shall operate as a supersedeas herein, and that a true copy of the record, assignment of error and all proceedings had in the case in the Supreme Court of the State of Oklahoma, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said court may inspect the same and do what according to law should be done.

J. F. SHARP,
Chief Justice of the Supreme Court of Oklahoma.

[SEAL.]

Attest:

WM. M. FRANKLIN,
Clerk Supreme Court,
By G. C. STARK,
Deputy.

Filed in Supreme Court of Oklahoma, Jan. 23, 1918. William M. Franklin, Clerk.

10 Filed in Supreme Court of Oklahoma, Jan. 24, 1918. William M. Franklin, Clerk.

In the Supreme Court of the United States.

W. A. HANCOCK, W. L. HOFFMAN, S. F. STEVENS, J. C. WELCH, Jeanette Langenberg, O. E. Swan, Isiah Davis, F. Simpson, C. F. Meadors, P. A. Gavin, H. W. Bly, W. A. Wilson, John W. Brown, Grant Brown, W. D. Brewer, William Ragsdale, J. L. Huff, Edith H. Brainard, Emma Weiland, Mrs. P. J. Burlingame, Henry Stebbins, A. H. Sharum, J. N. McEntee, P. L. Snyder, Bessie Rowley, N. K. Farmer, John J. Moore, E. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Alice Smith, Anderson Stewart, Franklin Garland, Robert Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Bills, C. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, W. B. Pearson, Ida Grant, Elizabeth Cook, C. F. Bullard, F. P. Sager, C. A. Thompson, J. B. Parks, S. H. Young, J. A. Mell, Margaret Nagle, Ben H. Brown, W. H. Kramer, W. C. Garret, L. S. Copeland, W. H. Rairden, Susan Chabbourn, L. E. Tomm, J. L. Havis, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora F. Moorer, M. M. Lane, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Dotty, E. Page, C. B. Finnigan, Muskogee National Bank, C. N. Collins, C. M. Fullenweider, R. S. Marshall, Bent Cobb, J. B. Fue, J. W. Morton, Rubin Mayo, Lida B. Jobe, J. M. Brucker, G. E. Burford, H. H. Atkins, Sadie M. Lovell, L. F. Flamm, Una H. Tevis, J. M. Stout, C. J. Eddy, Ben Hall, H. L. Jolly, O. F. Beebe, Grant Foreman, Mrs. Pulliam, W. S. Bullard, Ophelia King, L. P. Bullard, John F. Smith, Fred J. Wilkemyer, J. P. Nichols, H. W. Gibson, U. L. Jackson, Wood Hurt, Guy Morrison, H. H. Carter, A. F. Hubbert, E. W. Smart, W. R. Emerson, Muskogee Gas and Electric Co., American National Bank, Presilla Mackey, W. J. Quarles, D. H. Linebaugh, W. L. Biggs, F. E. Coss, J. M. Miller, Chas. Nelson, M. L. Gerton, C. T. West, C. A. Lockard, W. P. Fields, Washington Loan and Trust Company, Rachel Slagel, Ella Mallow, J. H. Melton, and Midland Valley Railroad Company, a Corporation; W. W. Bibb, Rachel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey, J. E. Lyles, R. T. Payne, J. E. Winan, W. M. Newbold, C. M. Whaley, Earnest Price, Molly Luther, W. H. Carson, Thomas Kennedy, J. H. Kennedy, P. E. Heckman, Ward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcomb, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. W. Franklin, W. P. Fields, J. W. Quarles, A. C. Raymon, Robert Wrigley, Martha J. Moore, Charles Nelson, Alma Leach, Vin Truman, L. E. Sperry, J. A.

Wright, John W. Morton, E. J. Hodges, W. B. Riley, Hugh A. King and Ralph E. Campbell, Plaintiffs in Error,

VS.

THE CITY OF MUSKOGEE, OKLAHOMA; FRANKLIN MILLER, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, Defendants in Error.

11 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment and decision of a plea which is in the said Court before you, or some of you, between W. A. Hancock, and others, plaintiffs in error and The City of Muskogee, Oklahoma, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, defendants in error, being Civil Cause No. 8315 on the docket of your court, your court being the highest court of the said state having jurisdiction to render judgment in the case, there was drawn in question the validity of certain statutes of the State of Oklahoma on the ground of the repugnancy to the constitution of the United States, and the decision was in favor of the validity of the law of the said State, and there was drawn in question the construction of a clause of the constitution of the United States and the decision was against the right, title, privilege or exemption specially set up and claimed under such clauses of the constitution; and there was drawn in question the validity of Sections 984 to 993, inclusive of Snyder's Compiled Laws of Oklahoma, 1909, the same being an Act of Legislature of the 1903 Session of the Legislative Assembly of the State of Oklahoma, entitled:

12 "An Act authorizing Municipal Corporations to extend or build general sewer systems and to levy special assessments of taxes to pay for same," being in conflict with the Fourteen-Amendment to the Constitution of the United States, in that proceedings authorized by the said statutes of Oklahoma amounts to and is the taking of property without due process of law and denies to the plaintiffs in error the equal protection of the laws, and there being manifest error in said decision, greatly to the damage of the said W. A. Hancock and each of the said petitioners in error; and we being willing that if there is error it *who*uld be duly corrected and full*y* and speedy justice done to the parties aforesaid in this behalf.

We do therefore command you that judgment be therein given, that, then, under your seal, you send the record and proceedings had in said cause, with all things concerning the same, to the Su-

preme Court of the United States, together with this writ so that you have the same at Washington on or before the 23rd day of February, A. D. 1918, in the Supreme Court to be then and there held that the record may be inspected by the said Court and justice done.

Witness the Honorable Edward D. White, Chief Justice of the United States Supreme Court, this 23rd day of January, in the year of our Lord one thousand nine hundred and eighteen.

Issued at office in Oklahoma City with the seal of the District Court of the United States for the Western District of Oklahoma, and dated as aforesaid.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States, Western District of Oklahoma.

Allowed on the said plaintiffs in error giving bond according to law in the sum of $2500.00.

J. F. SHARP,
Chief Justice of the Supreme Court of Oklahoma.

13 Filed in Supreme Court of Oklahoma Feb. 2, 1918. William M. Franklin, Clerk.

In the Supreme Court of the United States.

W. A. HANCOCK, W. L. HOFFMAN, S. F. STEVENS, J. C. WELCH, Jeanette Langenberg, O. E. Swan, Isiah Davis, F. Simpson, C. F. Meadors, P. A. Gavin, H. W. Bly, W. A. Wilson, John W. Brown, Grant Brown, W. D. Brewer, William Ragsdale, J. L. Huff, Edith H. Brainard, Emma Weiland, Mrs. P. J. Burlingame, Henry Stebbins, A. H. Sharum, J. N. McEntee, P. L. Snyder, Bessie Rowley, N. K. Farmer, John J. Moore, E. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Alice Smith, Anderson Stewart, Franklin Garland, Robert Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Bills, C. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, W. B. Pearson, Ida Grant, Elizabeth Cook, C. F. Bullard, F. P. Sager, C. A. Thompson, J. B. Parks, S. H. Young, J. A. Mell, Margaret Nagle, Ben H. Brown, W. H. Kramer, W. C. Garret, L. S. Copeland, W. H. Rairden, Susan Chabbourn, L. E. Tomm, J. L. Havis, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora F. Moorer, M. M. Lane, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Dotty, E. Page, C. B. Finnigan, Muskogee National Bank, C. N. Collins, C. M. Fullenweider, R. S. Marshall, Bent Cobb, J. B. Fue, J. W. Morton, Rubin Mayo, Lida

B. Jobe, J. M. Brucker, G. E. Burford, H. H. Atkins, Sadie M. Lovell, L. F. Flamm, Una H. Tevis, J. M. Stout, C. J. Eddy, Ben Hall, H. L. Jolly, O. F. Beebe, Grant Foreman, Mrs. Pulliam, W. S. Bullard, Ophelia King, L. P. Bullard, John F. Smith, Fred J. Wilkemyer, J. P. Nichols, H. W. Gibson, U. L. Jackson, Wood Hurt, Guy Morrison, H. H. Carter, A. F. Hubbert, E. W. Smart, W. R. Emerson, Muskogee Gas and Electric Co., American National Bank, Presilla Mackey, W. J. Quarles, D. H. Linebaugh, W. L. Biggs, F. E. Coss, J. M. Miller, Chas. Nelson, M. L. Gerton, C. T. West, C. A. Lockard, W. P. Fields, Washington Loan and Trust Company, Rachel Slagel, Ella Mallow, J. H. Melton, and Midland Valley Railroad Company, a Corporation; W. W. Bibb, Rachel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey, J. E. Lyles, R. T. Payne, J. E. Winan, W. M. Newbold, C. M. Whaley, Earnest Price, Molly Luther, W. H. Carson, Thomas Kennedy, J. H. Kennedy, P. E. Heckman, Ward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcomb, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. W. Franklin, W. P. Fields, J. W. Quarles, A. C. Raymon, Robert Wrigley, Martha J. Moore, Charles Nelson, Alma Leach, Vin Truman, L. E. Sperry, J. A. Wright, John W. Morton, E. J. Hodges, W. B. Riley, Hugh A. King and Ralph E. Campbell, Plaintiffs in Error,

VS.

THE CITY OF MUSKOGEE, OKLAHOMA; FRANKLIN MILLER, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, Defendants in Error.

14 *Supersedeas Bond.*

Know all men by these presents, That we, W. A. Hancock and others Plaintiffs in error, as principals, and Southern Surety Company of Oklahoma, as sureties, acknowledge ourselves to be jointly indebted to the City of Muskogee, Oklahoma, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Chas. Wheeler, Jr., City Clerk of Muskogee, Oklahoma, and their successors in office, as Defendants in Error in the above cause, in the sum of Twenty-five Hundred Dollars ($2500.00), conditioned that whereas on the 6th day of November, 1917, in the Supreme Court of the State of Oklahoma in a suit pending in that Court wherein the principals herein were Plaintiffs in error, and the Defendants and obligees herein were Defendants in error, in the said Court numbered on the Docket as 8315, a decree and decision was rendered affirming judgment of the District Court of Muskogee County, State of Oklahoma, and denying a Petition for Rehearing as to such affirmance, dismissing the bill of the Plaintiffs in Error for an injunction restraining the Defendants in Error from the enforcement of certain taxes and assessments made and attempted to be made upon the properties of the Plaintiffs in error, the said Plaintiffs in error having obtained an appeal to the Su-

preme Court of the United States and filed a copy thereof in the office of the Clerk of the said Supreme Court of the State of Oklahoma, to reverse said decree, and a citation directed to the said Defendants in error citing and admonishing them to be and appear in the Supreme Court of the United States to be holden in the City of Washington, District of Columbia,

Now if the said Plaintiffs in error shall prosecute their appeal to effect, and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

W. A. HANCOCK ET AL.
By W. A. HANCOCK,
Principals.
SOUTHERN SURETY COMPANY,
By O. A. WELLS,
Secretary.

Approved 2nd day of Feb., 1918.

J. F. SHARP,
Chief Justice.

15 In the Supreme Court of the State of Oklahoma.

Filed May 15, 1916. William M. Franklin, Clerk.

#8315.

W. A. HANCOCK, W. L. HOFFMAN, S. F. STEVENS, J. C. WELCH, Jeanette Langenberg, O. E. Swan, Isiah Davis, F. Simpson, C. F. Meadors, P. A. Gavin, H. W. Bly, W. A. Wilson, John W. Brown, Grant Brown, W. D. Brewer, William Ragsdale, J. L. Huff, Edith H. Brainard, Emma Wieland, Mrs. P. J. Burlingame, Henry Stebbins, A. H. Sharum, J. N. McEntee, P. L. Snyder, Bessie Rowley, N. K. Farmer, John J. Moore, E. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Ella Smith, Anderson Stewart, Franklin Garland, Robert Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Dills, Ella Mallow, Rachel Slagle, C. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, W. B. Pearson, Ida Grant, Eizabeth Cook, C. F. Bullard, E. P. Sager, J. H. Moten, C. A. Thompson, J. B. Parks, S. K. H. Young, J. A. Mell, Margaret Nagle, Ben H. Brown, W. H. Kramer, W. C. Garret, L. S. Copeland, W. H. Rairden, Susan Chadbourn, L. E. Tomm, J. L. Havice, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora F. Moorer, M. M. Lane, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Dotty, E. Page, C. B. Finnigan, Muskogee National Bank, C. N. Collins, C. M. Fullenweider, R. N. Marshall, Bent Cobb, J. S. Fue, J. C. Corbon, Rubin Mayo, Lida B. Jobe, J. M. Brucker, G. E. Burford, H. H. Atkins, Sadie M.

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vs.

THE CITY OF MUSKOGEE, OKLAHOMA; FRANKLIN MILLER, J. W. Boen, James King, Joe McCusker, W. N. Patterson, Mayor and Commissioners, and Charles Wheeler, Jr., City Clerk of Muskogee, Oklahoma, Defendants in Error.

Petition in Error.

16 The said W. A. Hancock et al., Plaintiffs in Error, complains of the said Defendants in error for that the said City of Muskogee, Oklahoma, et al., Defendants in Error, at the February, 1916, term of the District Court of Muskogee County, State of Oklahoma, recovered a judgment by the consideration of the said court against the said W. A. Hancock et al., Plaintiffs in Error, in a certain action then pending in said court wherein the said W. A. Hancock et al. were plaintiffs and the said City of Muskogee, et al. were defendants. A certified transcript of the record of said court together with the original case-made duly certified and attested is hereto attested marked "Exhibit A" and made a part of this Petition in error.

And the said W. A. Hancock et al., plaintiffs in error, aver that there is error in said record and proceedings in this, to-wit:

I.

That said court erred in sustaining the demurrer of the defendants in error to the petition and amendments thereto of the plaintiffs in error.

II.

That the said court erred in rendering judgment for the defendants in error on the petition and amendments thereto of the plaintiffs in error.

III.

That the said court erred in dissolving the temporary injunction which had been theretofore granted against the defendants in error.

IV.

The said court erred in holding that the proceedings of the Mayor and Commissioners of the City of Muskogee which were fully set forth in the Plaintiffs' petition and amendments thereto, constituted due process of law as to the plaintiffs in error within
17 the meaning of the Fourteenth Amendment to the Constitution of the United States.

V.

The court erred in holding that the plaintiffs in error were not deprived of their property without due process of law as provided by the Fourteenth Amendment to the Constitution of the United States.

VI.

The court erred in holding that the statutes and laws of the State of Oklahoma providing for the manner of giving notice to property owners as to proposed sewer improvements and the letting of contracts therefor and assessments of benefits to said property owners constituted as to such property owners due process of law within and as provided by the Fourteenth Amendment to the Constitution of the United States.

VII.

That the said court erred in holding that the petition of the plaintiffs in error and amendments thereto did not state facts sufficient to constitute a cause of action in favor of plaintiffs in error and against the defendants in error, and in holding that the said facts stated and alleged in said petition and amendments thereto did not entitle the plaintiffs in error to the relief prayed therein.

VIII.

The said court erred in not overruling the demurrer of the defendants in error to the petition and amendments thereto of the plaintiffs in error.

IX.

The said court erred in dismissing the petition and amendments thereto of the plaintiffs in error for want of equity after the plaintiffs in error had elected to stand thereon and refused to plead
18 further.

Wherefore, the plaintiffs in error pray that the judgment so rendered be reversed, set aside and held for naught, and that judg-

ment be rendered in favor of plaintiffs in error and against defendants in error, or that the same be remanded for a new trial.

BLAKENEY AND MAXEY &
GRANT FOREMAN,
Attorneys for Plaintiffs in Error.

Service of a copy of the above petition in error is hereby acknowledged to have been made on defendants in error this 12 day of May, 1916.

W. J. CRUMP,
Attorneys for Defendants in Error.

19 In the District Court in and for Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

"EXHIBIT A."

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District Court, State of Oklahoma, County of Muskogee. Filed May 9, 1916. C. H. Shaffer, Court Clerk.

Filed May 15, 1916. William M. Franklin, Clerk.

20 In the District Court in and for Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

THE CITY OF MUSKOGEE et al., Defendants.

Be it remembered, that on this the 17th day of February, 1916, this cause was commenced by the filing in the office of the Court Clerk of Muskogee County, State of Oklahoma, a Petition, which said petition is in words and figures, as follows, to-wit:

21 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

No. 4690.

W. A. HANCOCK, A. H. SHARUM, J. M. MCENTEE, P. L. SNYDER, Bessie Rowley, N. K. Farmer, John T. Moore, L. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Ella Smith, Anderson Stewart, Franklin Garland, Robt. Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Dilis, W. L. Hoffman, S. F. Stevens, J. C. Welch, Janey Langenberg, O. E. Swan, Isiah Davis, F. Simpson, J. F. Meadors, J. L. Haner, P. A. Gavin, H. W. Ely, W. A. Wilson, John W. Brown, Grant Brown, W. D. Brewer, Wm. Ragsdale, J. L. Huff, Edith H. Brainard, Emm Weiland, Mrs. P. L. Burlingame, Henry Stebbins, W. B. Pearson, Ida Grant, Mrs. Elizabeth Cook, C. F. Bullard, H. P. Sager, J. H. Meton, Dr. C. A. Thompson, J. B. Parks, S. H. M. Young, J. A. Bell, Margaret Nagle, Dr Ben H. Brown, W. H. Kremer, W. C. Garrett, L. S. Copeland, W. R. Rairdon, Susan Chadbourn, L. E. Tomm, J. L. Havis, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora H. Moorer, M. M. Lane, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Doty, E. Page, C. H. Finnigan, Muskogee National Bank, C. N. Collins, C. M. Fullenweider, R. S. Marshall, Bent Cobb, J. B. Fue, J. W. Morton, Reuben Mayo, Lida B. Rose, J. M. Brucker, G. E. Burford, H. H. Atkins, Sady M. Lovell, L. F. Flamm, Una H. Tevis, J. M. Stout, C. J. Eddy, Muskogee National Bank, Ben Hall, H. L. Jolly, O. F. Beebe, Grant Foreman, Mrs. Pulliam, W. S. Bullard, Orphelia King, L. F. Bullard, John F. Smith, Fred J. Wikemyer, J. T. Nichols, H. W. Gibson, U. L. Jackson, Wood Hurt, Gur Morrison, H. H. Carter, A. F. Hubbert, E. W.

Smart, W. R. Emerson, Muskogee Gas & Electric Company, American National Bank, Presilla Mackey, W. J. Quarles, D. H. Linebaugh, W. L. Diggs, F. E. Coss, J. M. Miller, Charles Nelson, M. L. Gerton, C. T. West, W. P. Fields, C. A. Lockard, Washington Loan & Trust Company and Midland Valley Railroad Company, a Corporation, Plaintiffs,

VS.

THE CITY OF MUSKOGEE, FRANKLIN MILLER, J. W. BOEN, JAMES King, Joe McCusker, W. N. Patterson and Charles Wheeler, Jr., City Clerk, Defendants.

22 *Petition.*

The plaintiffs complain of the defendants, and for cause of action:

That the plaintiffs are legal residents and tax payers of said city of Muskogee, except the plaintiff the Midland Valley Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Arkansas: and that said railroad company is the owner of property located in sewer district hereinafter described.

That the defendant, the City of Muskogee, is and at all times hereinafter mentioned was a municipal corporation and a body politic and corporate, and one of the legal divisions of the State of Oklahoma; that the defendant, Franklin Miller, is the duly elected and qualified Mayor of the said City of Muskogee, and that the defendants, J. W. Boen, James King, Joe McCusker and W. N. Patterson, are the duly elected and qualified commissioners of the said City of Muskogee, and Charles Wheeler, Jr., is the duly appointed City Clerk; that the said City of Muskogee is and was at all said dates and times, duly constituted, existing and acting as a city in said State, with a city government duly organized under the laws of said State, and prior to September 12th 1910, had a population of more than one thousand persons.

That the plaintiffs are the owners of real estate in the City of Muskogee, hereinafter described.

23 That neither the said City of Muskogee nor its Mayor and councilmen have ever caused a general sewer system to be established in said City as authorized by the Statutes of the State of Oklahoma found in Ch. 15 Snyder's Compilation, Article XVI, Sec. 984.

That the City of Muskogee, by its Mayor and City Council, by Ordinance #613, duly passed September 12th, 1910, and approved September 13, 1910, and published on the 16th, 23rd, and 30th days of September, and the 7th day of October, 1910, did pretend to ordain and create a so-called storm sewer district #12, in the City of Muskogee, according to the description as set forth in said ordinance, which Ordinance is in words and figures as follows, to-wit:

Ordinance No. 613.

An ordinance creating sewer district No. 12 in the City of Muskogee, Oklahoma: providing for the construction of a sewer therein: adopting plans, specifications, profiles, plats, sections and complete estimate of cost of the city engineer for the construction of said sewer: prescribing the dimensions and the material to be used in the construction of the same and declaring an emergency.

Whereas, the Mayor and the councilmen of the City of Muskogee, Oklahoma deem it necessary to construct a district sewer within and to drain the district hereinafter described and created;

24 Therefore, Be it ordained by the Mayor and Councilmen of the City of Muskogee, Oklahoma;

Section 1. There is hereby established and created sewer district No. 12 of the City of Muskogee, Oklahoma, which shall comprise all of that portion of the said City of Muskogee, embraced within and bounded by the following lines, to-wit:

Beginning at the center line of South Ninth Street at a point fifty (50) feet south of the North line of West Kalamozoo Street; thence westerly to and with the south line of West Kalamazoo Street to its intersection with the southeast live of the right-of-way of the St. Louis & San Francisco R. R.; thence westerly to the intersection of Dean Avenue with the northwest line of the right-of-way of the St. Louis & San Francisco R. R.; thence west with the center line of Dean Avenue to the center of South Junction Avenue; thence north with the center line of South Junction Avenue to a point opposite the center line of Estelle Avenue; thence West with the center line of Estelle Avenue to a point opposite the center of the north and south alley in block ten (10) Garrett Heights; thence north with the center line of said alley to the center of Tennyson Avenue; thence west with the center line of Tennyson Avenue to a point opposite the center of the north and south alley in block Six (6) Garrette Heights; thence north with the center line of said alley to the center of Carolyn Avenue; thence west with the center of Carolyn Avenue to the center of South Twenty-Fourth street; thence north with the center line

25 of south Twenty-fourth street (a portion of which street is also known as Nineteenth street) and north Twenty-fourth street to a point opposite the center of the east and west alley in Block Seven (7), Findley Heights; thence east with the center line of said alley and of the alley in Block Six (6), Findley Heights, to the center of North Twenty-first street; thence south with the center line of North Twenty-first street to the center of Denison street; thence southeasterly with the center line of Denison street; then to the center of North Seventeenth Street; then southwesterly with the center line of North Seventeenth street to the center of Broadway; then southeasterly with the center line of Broadway to the center of North Sixteenth street; then southwesterly with the center line of North Sixteenth street to the center of West Okmulgee Avenue; thence southeasterly with the center line of West Okmulgee avenue to the center of Fourteenth street; thence southwesterly with the center line of South Fourteenth

street to the center of Elgin Avenue; thence southeasterly with the center line of Elgin Avenue to the center of South Thirteenth street; thence southwesterly with the center line of South Thirteenth street to the center of Fremont street; thence southeasterly with the center of line of Fremont Street to the center of South Twelfth street; thence southwesterly with the center line of south Twelfth street to a point opposite the center of the alley in Block One Hundred and Eleven (111), Original townsite; thence southeasterly along the cen-
26 ter line of said alley to the center of South Eleventh street; thence southwesterly along the center line of South Eleventh Street to the center of Indianapolis avenue to its intersection with the East line of Dean's addition, extended North; thence south to and with the east line of Dean's addition to the center of Jackson Avenue; thence southeasterly with the center line of Jackson Avenue to the center of South Ninth Street; thence southwesterly with the center line of South Ninth street to the place of beginning.

Section 2. There shall be constructed within and to frain the sewer district created by Section 1, of this Ordinance a district sewer to be built of brick, concrete, vitrified brick, and vitrified tile pipe, which sewer shall be fifteen (15) inches in diameter at its extreme north end increasing in size to five (5) feet in diameter at its outlet, and all necessary laterals, inlets, catch-basins, manholes and other appurtenances, all in accordance with the plans, specifications, profiles, plats and sections of the City Engineer now on file in his office, and which are hereby adopted and approved.

Section 3. A complete estimate of the cost of the improvement contemplated by this ordinance heretofore prepared by the City Engineer and submitted at this time to the Council is hereby approved and ordered filed in the City Engineer's office, with the plans and specifications referred to in Section 2 of this ordinance.

Section 4. The City Clerk shall advertise for at least ten
27 (10) days in the Muskogee Daily Phœnix for sealed bids for the furnishing of the material and the performance of the work of constructing the said district sewer, which notice shall require each bidder to file with his sealed bid a check certified by some bank in the City of Muskogee for the sum of Five Thousand ($5,000.00) Dollars, payable to the City of Muskogee, to be forfeited if such bidder shall be awarded the contract for the improvement contemplated by this ordinance and shall fail to enter into the same and file the bonds hereafter required of him. The successful bidder shall with- ten (10) days after the award of the contract, enter into a bond running to the City of Muskogee in the sum of approximately twenty-five (25) per cent of the contract prive for the construction of said district sewer conditioned for the protection of the City and all property occasioned by the negligent execution of the work, and for the faithful construction of said district sewer in accordance with the provisions of his contract and in conformity to the plans, specifications, profiles, plats and sections referred to in Section 2 of this Ordinance. Such advertisement shall state the time and place when the said bids will be received and when they will be opened by the Mayor and councilmen; and shall also state that the Mayor and councilmen expressly reserve the right to reject any and all bids, and

to re-advertise for other bids when none of the bids are, in their judgment, satisfactory.

Section 5. An emergency is hereby declared by reason
28 whereof it is necessary for the immediate preservation of the public peace, health and safety that this ordinance take effect upon and after its passage, approval and publication.

Passed this 12th day of September, 1910, which description in said ordinance embraces approximately seventy city blocks and includes approximately sixty thousand lineal feet of property fronting on the public streets of said City.

The plaintiffs further show that the above described property embraces the property of the plaintiffs herein.

That thereafter, to-wit: on the 17th, 20th, 21st, 22nd, 23d, 24th, 27th, 28th, 29th, and 30th days of September, 1910, the said City of Muskogee by its Mayor and Council advertsied for bids for building a storm sewer or sewers in said alleged storm sewer district and which notice for bids, or notice to contractors as the same is styled, is as follows, to-wit:

Notice to Contractors.

The City Clerk of the City of Muskogee, Oklahoma, will receive sealed bids until 5 o'clock p. m. October 17, 1910, for performing the work and furnishing the material in the construction of a District Sewer with all necessary laterals, inlets, catchbasins, manholes and other appurtenances, within the following described Sewer District, known as Sewer District No. 12, which comprises all that portion of the said City of Muskogee, embraced within and bounded by the following lines, to-wit:

29 Beginning in the center of line of South Ninth Street at a point fifty (50) feet south of the north line of West Kalamazoo avenue;

Thence westerly to and with the south line of West Kalamazoo avenue to its intersection with the southwest line of the right of way of the St. Louis and San Francisco Railway;

Thence westerly to the intersection of Dean Avenue with the northwest line of the right of way of the St. Louis and San Francisco railway;

Thence west with the center line of Dean avenue to the center of South Junction avenue;

Thence north with the center line of South Junction Avenue to a point opposite the center line of Estelle avenue;

Thence west with the center line of Estelle avenue to a point opposite the center of the north and south alley in Block Ten (10), Garrett Heights;

Thence north with the center line of said alley to the center of Tennyson avenue;

Thence west with the center line of Tennyson avenue to a point opposite the center of the north and south alley in Block Six (6), Garrett Heights;

Thence north with the center line of said alley to the center of Carolyn avenue;

Thence west with the center line of Carolyn avenue to the center of South Twenty-fourth street;

Thence north with the center line of South Twenty-fourth street (a portion of which street is also known as Nineteenth Street) and North Twenty-fourth street to a point opposite the center of the east and west alley in Block Seven (7) Findley Heights;

Thence east with the center line of said alley and of the alley in Block Six (6), Findley Heights, to the center of North Twenty-first street;

Thence south with the center line of North Twenty-first street to the center of Denison street;

Thence southeasterly with the center line of Denison street to the center of North Seventeenth street;

Thence southwesterly with the center line of North Seventeenth street to the center of Broadway;

Thence southeasterly with the center line of Broadway to the center of North Sixteenth street;

Thence southwesterly with the center line of North Sixteenth street to the center of West Okmulgee avenue;

Thence southeasterly with the center line of West Okmulgee avenue to the center of Fourteenth street;

Thence southwesterly with the center line of South Fourteenth street to the center of Elgin Avenue;

Thence southeasterly with the center line of Elgin Avenue to the center of South Thirteenth street;

Thence southwesterly with the center line of South Thirteenth street to the center of Fremont avenue;

Thence southeasterly with the center line of Fremont Avenue to the center of South Twelfth street;

Thence southwesterly with the center line of South Twelfth street to a point opposite the center of the alley in Block One Hundred and Eleven (111), Original Townsite;

Thence southeasterly along the center line of said alley to the center of South Eleventh street;

Thence southwesterly along the center line of South Eleventh street to the center of Indianapolis avenue;

Thence southeasterly with the center line of Indianapolis avenue to its intersection with the east line of Dean's addition extended north;

Thence south to and with the east line of Dean's addition to the center of Jackson avenue;

Thence southeasterly with the center line of Jackson avenue to the center of South Ninth Street;

Thence southwesterly with the center line of South Ninth street to the place of beginning.

The above sewer will be constructed of brick, concrete, vitrified brick and vitrified tile pipe in accordance with the *pands* and specifications adopted by the Mayor and Council and now on file in the office of the City Engineer from whom same may be obtained.

Bids will be made on forms furnished by the City and for the larger sections, prices on brick, Class "A" and Class "C" concrete

must be given. Bids will be compared on brick and Class "A" concrete. Class "C" concrete may be used at the discretion of the Engineer and paid for at the price bid.

Each bidder must deposit with his bid an unconditioned check for $5,000.00, payable to the order of the City of Muskogee, certified by some solvent responsible bank in the City of Muskogee,
32 which check shall be forfeited to the City of Muskogee, unless the bidder, if awarded the contract, shall within ten (10) days after such award, enter into a suitable contract with the City of Muskogee for the performance of the work and furnishing of the materials for which his bid was made and shall, within five (5) days after such contract is approved by the City, execute to said City a bond with surety satisfactory to the Mayor and Council in the sum of approximately 25 per cent of the estimated cost of said District Sewer conditioned for the protection of the City and all property owners interested, against any loss or damage by negligent execution of the work, and for the faithful execution thereof.

Any conditions attached to the check so deposited will render the bid informal and liable to rejection.

The bids will be opened by the Mayor and Council in the Council Chamber at the City Hall, at 8:00 o'clock p. m. on the 17th day of October, 1910, and the contract will be awarded to the lowest and best bidder. The right is reserved to reject any and all bids and advertise for other bids when none are, in the judgment of the Mayor and Council, satisfactory.

CHAS. WHEELER, JR.,
City Clerk."

That neither the above notice to contractors for bids on said work, nor in the ordinance creating said district, nor in any other proceedings, advertisement or notice were the plaintiffs given an opportunity to appear and protest against said
33 proceedings nor given any opportunity whatever of a hearing or expression of any sort from these plaintiffs in opposition or defense, or as to any corrections or objections whatsoever, but that notwithstanding that these plaintiffs had no such opportunity on the 24th day of October, 1910, said Mayor and Council entered into a contract in writing with said E. P. McCormick for the construction of a sewer within the above described alleged storm sewer district of the following dimensions, to-wit: a diameter of five (5) feet at the lower extremity thereon, and fifteen (15) inches at the upper end thereof, which said storm sewer follows the natural watercourse of said portion of said City, and is a public storm sewer therein; and to create and construct several lateral storm sewers in said alleged district.

The Plaintiffs show further that under the direction of the Mayor and Council and other employees of the said City, the said F. M. McCormick has constructed a public or main truck line sewer and said lateral sewers.

Plaintiffs further show that the City of Muskogee by its officers, the Mayor and Council, have contracted and agreed with the said

F. P. McCormick to pay for the construction of said sewers and laterals by the levying of a special assessment on all the property included within the alleged district aforesaid, within which the property of these plaintiffs is included, and that said City and said Franklin Miller, J. W. Boon, James King, Joe McCusker and W. N.
34 Patterson as City Commissioners, on Dec. 3rd, 1915, by a legal vote, passed and adopted Ordinance #999, entitled "An Ordinance levying and assessing a special tax against each lot or parcel of ground in Sewer District #12, in the City of Muskogee, Oklahoma, to pay the costs of improvement in said District"; which Ordinance attempted and purported to assess and levy against all the property within the above described district, the sum of $56,607.67, being the cost of the construction of said sewer.

And prior to the passage of said ordinance or before it was to go into effect, or at any time either before or after the passage of the same levying such assessment against the property of these plaintiffs they had no opportunity to appear and protest against the same or to object thereto, or to offer any suggestions or corrections in the said assessments to the end that the burden of the same might be distributed according to benefits, or that the said property should be assessed according to any other rule or standard whatsoever but that said ordinance making such assessment was passed arbitrarily and without these plaintiffs having an opportunity to protest or object to the same as aforesaid or to see that numerous corrections were made as to erroneous assessments and otherwise to be heard upon the merits thereof.

That therein and thereby, the said Commission assessed against the property of the plaintiffs respectively, the sums of money hereinafter set forth, appearing opposite the lots owned by them in said district as follows:

35

Name.	Lot.	Block.	Addition.	Assessment.
P. L. Snyder	1	12	Alta Vista Add.	51.32
Bessie Rowley.... W. 50' 2 & E. 50'	3	2	Highlands Add.	98.37
N. K. Farmer.....1-2-3-4-5-&	6	10	Alta Vista Add.	307.92
John T. Moore.....E. ½	6	12	Highlands Add.	50.40
John T. Moore	3	6	Highlands Add.	100.80
L. W. Pitts	7	146	City	51.32
J. J. Pool.....N. 60' of 10-11 &	12	120	City	66.00
J. T. Lysle	1	145	City	51.32
Mr. Finley	5	10	Findlay Add.	51.32
B. E. Spivey.....	5 & 6	6	Alta Vista Add.	102.64
B. E. Spivey.....	7 & 8	4	Alta Vista Add.	102.64
Ella Smith.....W. ½ of N. ½	2	178	City	56.26
Anderson Stewart	15	1	Alta Vista Add.	51.32
Franklin Carland	2	201	City	102.64
Robt. Asquith	9	2	Alta Vista Add.	51.32
S. E. Coleman.....	3 & 4	1	Alta Vista Add.	102.64
Lucy Hassell	4	7	Alta Vista Add.	51.32
Mary Pitts	4	198	City	102.64
Susie H. Sharp	4	200	City	48.89
C. B. Bryant..... N. ½	3	200	City	51.32
A. R. Fair	11	8	Higgins Add.	54.99
W. C. Fair	14	8	Higgins Add.	54.99

Name.	Lot.	Block.	Addition.	Assessment.
R. D. Fair	13	8	Higgins Add.	54.99
Geo. Smith	S. 46½ 6	125	City	16.51
David Russell	S. 46½ 6	136	City	17.11
Geo. Wood	7	3	Deans Add.	82.48
W. S. Dills	6	10	Alta Vista Add.	51.32
W. L. Hoffman	1 & 2	11	Alta Vista Add.	102.64
S. F. Stevens	15 & 16	7	Alta Vista Add.	102.64
36				
J. C. Welch	E. 108'	173	City	158.35
Janet Langenberg	E. ½ 6	2	Highlands Add.	49.49
O. E. Swann	E. ½ 2	5	Highlands Add.	50.40
Isiah Davis	5	3	Deans Add.	50.26
F. Simpson	12	144	City	37.98
C. F. Meadors	4	201	City	102.64
J. L. Haner	S. ½ 10 & S. ½ 12	108	City	51.32
P. A. Gavin	N. 50' 6	198	City	51.32
H. W. Ely	12	8	Higgins Add.	54.99
W. A. Wilson	8	5	Alta Vista Add.	51.32
John W. Brown	13	7	Garrett Heights	48.39
Grant Brown	14	7	Garrett Heights	48.39
W. D. Brower	4	8	Alta Vista Add.	51.32
Wm. Ragsdale	2	2	Deans Add.	95.31
J. L. Huff	6 & 7	4	Garrett Heights	96.78
Edith H. Brainard	10	8	Alta Vista Add.	51.32
Emma Wieland	3 & 4	10	Findley Heights	102.64
Mrs. P. L. Burlingame	2	12	Alta Vista Add.	51.32
Henry Stebbins	3 & 4	1	Highlands Add.	197.94
W. B. Pearson	1-14-16	11	Higgins Add.	164.97
W. B. Pearson	4 & 12	12	Higgins Add.	109.98
W. B. Pearson	1	14	Higgins Add.	88.85
Ida Grant	6	136	City	17.11
Mrs. Elizabeth Cook	11	7	Alta Vista Add.	51.32
C. F. Bullard	14	1	Alta Vista Add.	51.32
H. P. Sager	10	7	Alta Vista Add.	51.32
J. H. Meton	13-14-15-16	7	Findlay Add.	223.60
J. H. Meton	11 & 12	6	Findlay Add.	111.80
37				
J. H. Meton	5	8	Findlay Add.	51.32
Dr. C. A. Thompson	9	7	Alta Vista Add.	51.32
W. B. Pearson	2-13-14	4	Garrett Hts.	136.35
J. B. Parks	2-4-6-8	198	City	205.28
S. H. M. Young	7	1	Higgins A.	54.99
J. A. Bell	2	137	City	3.52
Margaret Nagle	16	6	Alta Vista Add.	33.00
Dr. Ben H. Brown	S. ½ of 7	198	City	51.32
W. H. Kremer	12	7	Higgins Add.	54.99
W. C. Garrett	12	6	Alta Vista Add.	51.32
L. S. Copeland	1	6	Garrett Heights	48.39
W. H. Rairdon	7	9	Garrett Heights	48.39
Susan Chadbourn	2	8	Garrett "	51.14
L. E. Tomm	9	7	Garrett Heights	48.39
J. L. Havis, Trustee	9-10- & 11	7	Higgins Add.	164.97
J. L. Havis, Trustee	15 & 16	8	Higgins Add.	109.98
T. T. Gaddy	1-No. 100'	148	City	36.66
J. F. Lawrence	W. 65' 7	3	Highlands Add.	98.97
C. Pridgeon	15	6	Findlay Add.	55.90
Edith H. Brainard	10	8	Alta Vista Add.	51.32
Dora H. Moorer	10	1	Alta Vista Add.	51.32
M. M. Lane	5	5	Alta Vista Add.	51.32
Chas. L. Reed	13	8	Alta Vista Add.	51.32

Name.	Lot.	Block.	Addition.	Assessment.
C. L. Chapman	E. ½ 5	5	Highlands Add.	50.40
Lon Robinson	1	6	Higgins	54.99
H. C. Montague	17	6	Findlay Add.	55.90
Mr. Doty	6	1	Garrett Heights	48.39
E. Page	3	7	Deans Addition	45.24
C. H. Finnigan	8	120	City	51.32
38				
Muskogee Nat'l Bank	7 & 8	6	Higgins Add.	109.32
Muskogee Nat'l Bank	7 & 8	1	Alta Vista Add.	102.64
C. N. Collins	1 & 2	178	City	111.90
C. M. Collins	W. ½ 4 ..	6	Highlands Add.	50.40
R. S. Marshall	9-10 & 11	5	Higgins Add.	164.97
C. M. Fullenwolder	3 & 10' of 4	3	Highlands Add.	84.13
Bent Cobb	134–133	City		190.63
J. B. Fue	1	1	Deans Add.	17.42
J. W. Morton	3 & 4	2	Deans Add.	114.54
Reuben Mayo	12	138	City	51.32
Lida B. Robo	5 & 6	2	Higgins Add.	109.98
J. M. Brucker	1	145	City	51.32
G. E. Burford	14	5	Higgins Add.	54.99
H. H. Atkins	4	5	Highlands Add.	100.80
Henry Stebbins	7 & 8	2	Highlands Add.	197.94
Sady M. Lovell	W. ½ 2	3	Highlands Add.	49.48
L. F. Flamm	10	148	City	51.32
Una H. Tevis	S. ½ 7	198	City	51.32
J. M. Stout	All of	134	City	94.93
C. J. Eddy	2	144	City	48.10
Muskogee Nat. bk.	2	9	Findlay Add.	51.32
Ben Hall	5	9	Findlay Add.	51.32
Muskogee Nat. Bk.	5	1	Deans Add.	56.45
H. L. Jolly	7 & 8	7	Garrett Heights	72.59
H. L. Jolly	1 & 2	110	Garrett Heights	96.78
W. A. Hancock	N. ½ 3	178	City	113.02
W. A. Hancock	3 & 7	198	City	249.26
W. A. Hancock	4	12	Alta Vista Add.	51.32
O. F. Beebe	13	7	Higgins Add.	54.99
39				
Grant Foreman	1-7- & 8	6	Highlands Add.	293.02
Mrs. Pulliam	4-5-6-7- & 8	7	Higgins Add.	219.52
W. S. Bullard	E. ½ 6	6	Highlands Add.	50.40
Ophelia King	W. ½ 6	6	Highlands Add.	50.40
Ophelia King	13	5	Higgins Add.	54.99
L. P. Bullard	5	6	Highlands Add.	100.80
John F. Smith	7	8	Alta Vista A.	51.32
Fred J. Wilkemyer	7	5	Alta Vista Add.	51.32
J. T. Nichols	9	148	City	51.32
H W. Gibson	5 & 6	1	Highlands Add.	197.94
U. L. Jackson	11 & 12	7	Garrett Hts.	96.78
U. L. Jackson	11-12 & 13	6	Higgins Add.	164.97
Wood Hurt	1	201	City	102.64
Guy Morrison	N. 47' ..	6	Alta Vista Add.	17.23
H. H. Carter	W. 50' S. ½ 3	178	City	56.51
A. F. Hubbert	E. ½ of 3	2	Highlands Add.	49.49
E. W. Smart	1 & 8	5	Highlands Add.	109.98
J. M. McEntee	19	7	Findlay Add.	55.90
J. M. McEntee	5	8	Alta Vista Add.	51.32
J. M. McEntee	8	8	Alta Vista Add.	51.32
W. R. Emerson	9	6	Alta Vista Add.	51.32
Muskogee Gas & Elec. Co.	8	3	Alta Vista Add.	51.32
American Nat. B'nk.	10-11-12-13-14-151	2	Alta Vista Add.	307.92

Name.	Lot.	Block.	Addition.	Assessment.
Muskogee Nat. Bank	11-12-13-14-15-16	1	Higgins Add.	329.94
Muskogee Nat. Bank	2-3-4-5	6	Higgins Add.	219.96
Presilla Mackey	20	6	Findlay Hts.	55.90
W. J. Quarles	1-2 & S. ½ 3	7	Higgins Add.	137.47
A. H. Sharum	10	141	City	2.57
A. H. Sharum	1-2-5-6	130	City	134.64
A. H. Sharum	1-2-3-4-5- & Lo. 11-12	123	City	410.56
40				
A. H. Sharum	1 to 12 inclusive	121	City	615.84
A. H. Sharum	7-8-9-10-11-12	110	City	307.92
A. H. Sharum	2-3-4-5-6-10-11-12	109	City	410.56

	No. of sq. feet.	Assessment.
Midland Valley R. R. Co. That part of the district occupied by the Midland Valley Railroad right of way	182,000	1,334.19

D. H. Linebaugh	3	3	Alta Vista Add.	51.32
W. L. Biggs	1	3	Highlands Add.	98.97
F. E. Coss	6	3	Highlands	98.97
J. M. Miller	10	3	Alta Vista	51.32
J. M. Miller	4	5	Alta Vista	51.32
J. M. Mills	4	6	Alta Vista	51.32
Chas. Nelson	1 & 2	2	Alta Vista	102.64
M. L. Gerton	6	147		27.42
C. T. West	8	175		51.32
W. P. Field	40′ 6	201		29.33
W. P. Field	60′ 6	201		43.99
C A. Lockard	3 & 4	201		205.28
Washington Loan & Trust Company	6	198		102.64

The plaintiffs further show that Block 198 in the City of Muskogee, which is included in said sewer district, was platted by the government survey of said city into seven (7) lots. That after, and before the creation of said sewer district, Lots One (1), Two (2) and Three (3) of said Block 198, were sub-divided into Lots One
41 (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), and Eight (8) and two (2) alleys were platted upon said sub-division, which alleys do not appear upon the original plat of said city.

That the plaintiff, W. A. Hancock, became the owner of Lots Three (3), and Seven (7) in said sub-division of Lots One (1), Two (2) and three (3) of Block 198, and has been the owner of said lots for more than a year past. That the assessing ordinance passed by the said Board of Commissioners on Dec. 3, 1915, has assessed all of the property in Block 198 for a part of the cost of said sewer, but has erroneously failed to assess the same against the lots with- said block according to the legal sub-division, and numbers thereof, as platted and sub-divided according to the official records of said City, platting and sub-dividing, now o- file in the office of the County Clerk for Muskogee County and that by reason thereof, Lot Three (3) owned by said plaintiff, W. A. Hancock, is not assessed by itself, but is included within the original lots One (1) and Two (2) of said Block, charges against which amount to the sum of $293.24, and thereby includes property for which said plaintiff, Hancock is

not liable, and in which he has no interest; so that before said Hancock can discharge the lien on his property, according to said assessing ordinance, it will be necessary for him to pay the assessment on property many times the area of the property owned by him, and that said Block was sub-divided before the pretended organization or creation of said sewer district.

42 The plaintiffs show further that a sewer within said district #12, was contracted for, and constructed under a pretended authority contained in section 985 to 993 inclusive of Snyder's Compiled Laws of 1909, and Ordinance 613 of the City of Muskogee. That nowhere in said statutes or in said Ordinance was provisions made for hearing of objection or corrections by the property owners sought to be charged for the construction of said sewer, and thereby the plaintiff, W. A. Hancock, nor his grantors were afforded as opportunity to protest or object to the said proceedings mission of the City of Muskogee and object to having his property assessed with other property, in an amount greatly in excess of a proper charge against the property owned by him.

The plaintiffs show that the statutes under which said sewer district was created and the assessing ordinance passed by the City of Muskogee, as well as Ordinance No. 613 and Ordinance No. 999 passed on December 3, 1915, assessing the cost of said sewer district against the property within said district No. 12 are all unconstitutional and void for the reason that at no place therein either as provided by the statutes of the State or the ordinance of the city of Muskogee, Oklahoma, was these plaintiffs, or are they at this time afforded an opportunity to protest or object to the said proceedings or any part thereof, nor to have the same corrected or adjusted, nor to have any hearing in regard or relation thereto whatsoever;

43 not at no time during the course of said proceedings did these plaintiffs have any notice or knowledge thereof, nor does the law nor said ordinance provide for any notice of any kind or character to these plaintiffs or others interested in said sewer district. And that said statutes of this state, as aforesaid, and ordinances of said City are in violation of the provisions of the fourteenth amendment to the Constitution of the United States in that the proceedings had by said city and pretended to be authorized by said statutes and ordinances constitute and result in the taking of the property of these plaintiffs without due process of law and that the proceedings of said defendant under said statutes and ordinances deny as to these plaintiffs the equal protection of the law in that the inhabitants of the defendant city living in other sewer districts receive the benefits of the general bonds voted by said defendant, as hereinafter described, and that these plaintiffs, although being compelled to apy taxes to liquidate said bond indebtedness which was created for the building of storm sewers, is, notwithstanding, required to pay for the sewer in said district by special assessment therefor; and these plaintiffs claim a right, privilege and immunity under the fourteenth amendment to the Constitution of the United States in that the said statutews and ordinances and proceedings deprive them of their property without due process of law and denies to them the

equal protection of the law and ask this Court to adjudicate
44 and pass upon their rights under said provisions of the Constitution of the United States as aforesaid.

Tje plaintiffs show that under said pretended authority, and without notice or opportunity to be heard in opposition thereto, the defendants, the City of Muskogee, the Commissioners and City Clerk, entered into a contract with one F. P. McCormick for the construction of said sewer, and promised therein and thereby, to pay the said F. P. McCormick, by assessing the cost of said sewer against the property within the district, and by a special assessment to collect from these plaintiffs, the amounts heretofore set out herein opposite the lots owned by them, and that said defendants are now threatening to, and are about to execute and deliver to the said F. P. McCormick, certain negotiable bonds evidencing an assessment of the property above named, and rendering said property liable to pay for the use of holders of said bonds, the amounts respectively appearing opposite their lots, hereinabove set forth, and that unless restrained, these defendants will execute and deliver said bonds and that said bonds when delivered will be negotiable by said McCormick to innocent purchasers for value.

The plaintiffs show further that their property has been listed with the proper officials for taxation, and has been taxed and is now taxed for the purpose of paying all the burden of taxable real estate of the City of Muskogee, including certain taxes to be placed in the sinking fund *fo* the City of Muskogee for the purpose of re-
45 deeming bonds voted by the whole city of Muskogee for the construction of public storm sewers in said city, one of which sewers, now completed, is embraced in a district smaller than the district herein and that no property in the city of Muskogee other than that included in the district aforementioned has been taxed or threatened to be taxed to pay for said storm sewer in said district No. 12. And if said property within said alleged storm sewer district No. 12 including said property of plaintiffs, shall be made liable for said special assessment, there will be imposed upon it not only the burden of contributing its share towards the construction of other storm sewers in the City of Muskogee, but it will carry the additional burden of paying for a public sewer, which burden is not shared by property in said City outside of said district No. 12.

The plaintiffs show further that on October 15, 1908, there was held in the City of Muskogee by legal authority an election on the proposed issue of $300,00-.00 of bonds by said city, for the purpose as stated in the call for said election, "to construct additional trunk line storm sewers and public sanitary sewers and outlets for the proper drainage of said city."

That at said election the proposed bond issue was carried by a legal vote and said bonds were afterward issued and became a lien on all the real estate in the City of Muskogee, including the property of the plaintiffs described herein. That said bonds were sold and realized the sum of $309,573.30, which was held by the
46 City for the purpose which it was voted; and which sum was ample for the purpose of intersecting the city of Muskogee

with trunk line storm sewers including the sewer in the property described herein, and for the construction of public sanitary sewers and outlets for the proper drainage of said city.

That the Mayor and Council in behalf of the City of Muskogee entered into contracts for the construction of sewers as follows:

Heman Construction Company, for the construction of storm sewer number one, for which the city had paid $71,542.16, on July 25, 1910.

E. P. McCormick, for the construction of storm sewer number two, for which the city had paid $33,695.50, on May 31, 1910.

E. P. McCormick, for the construction of storm sewer number three, for which the city had paid $72,395.55, on May 31, 1910.

Heman Construction Company, for the construction of sanitary sewer number 10, for which the city had paid $30,371.56, on May 31, 1910.

Heman Construction Company, for the construction of sanitary sewer number eleven, for which the city had paid $22,868.80, on May 31, 1910.

All of which sums were paid out of the proceeds of said bond issue.

That on September 12, 1910, the date on which the City Council created the sewer district herein complained of, there was a balance of said fund of $309,573.30, realized from said bond sale,
47 belonging to said City of Muskogee, unexpended and not contracted for of more than $50,000.00.

That on September 12, 1910, at a time the City of Muskogee was in possession of sufficient funds to build a storm sewer to drain the property herein described, which funds were realized by the sale of bonds which were then and now are a lien on said property, the City of Muskogee by its Mayor and Council, without notice to the plaintiffs and without their consent, illegally and unjustly discriminated against the plaintiffs by proposing to build a public storm sewer through said property and refusing to pay for the same or any part thereof with the funds then held by the City and realized for that purpose.

Plaintiffs allege that when the work was being constructed and said sewers built that they were under the impression and believed that the same was being built by the defendant City out of the proceeds of the sale of the general bonds of said city issued for that purpose and did not know and did not stand by and see such improvements going in with the knowledge that they were to be assessed therefor, but understood at all times that the same were to be paid for out *fo* the bond issue voted for such purpose as above alleged. And if they had *of* known or had any notice or knowledge of the intention of the defendant- herein to assess the value of said improvement to the property of these plaintiffs they would have protested and objected thereto during the time that such work was being conducted and that these plaintiffs did not know that a part of the funds
48 voted by the City under the general bond issue, as above stated, had been diverted or squandered for other purposes and did not know that it was the intention to assess them for the value of this improvement until the work was entirely completed

and when the defendant attempted to deliver to the contractor bonds therefor; nor had these plaintiffs had any notice of any kind or character either actual or constructive thereof.

Wherefore, the Plaintiffs pray this Honorable Court for a temporary injunction against the City of Muskogee and the said defendants, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson and Charles Wheeler Jr., and their successors in office, enjoining and restraining them from proceeding to execute and deliver to the said F. P. McCormick, or any other person, any bond or evidence of indebtedness or liability against the property above described, or from collecting or attempting to collect such special assessment to pay charges hereinbefore set forth; or to pass or to consider officially any Ordinance or resolution to that end, or from certifying such special assessment to the County Treasurer or to any other officer, upon the failure of the plaintiffs, or any of them to pay the charges against their property, and extend said injunction or restraining order against said defendants until the cost of the construction of said sewer shall have been taxed against all of the property in the City of Muskogee, so that the property of the plaintiffs described herein may be required to pay only its just share of such burden of taxation, and that on final hearing of said cause,
49 said defendants be perpetually enjoined and restrained from enforcing the collection of said special assessment against the property of the plaintiffs hereinabove described, and that the plaintiffs have all other just and proper relief, and that the defendants be adjudged to pay the cost of this action.

BLAKENEY AND MAXEY,
GRANT FOREMAN,
Attorneys for Plaintiffs.

STATE OF OKLAHOMA,
Muskogee County:

W. A. Hancock, being duly sworn upon oath, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has carefully read the above and foregoing petition and knows the contents thereof and that the allegations and statements therein contained are true and correct.

W. A. HANCOCK.

Subscribed and sworn to before me this 16 day of February, 1916.

ETTA P. JULIAN,
[SEAL.] *Notary Public.*

My commission expires July 13, 1918.

(Endorsed:) No. 4690. W. A. Hancock et al., Plaintiffs vs. The City of Muskogee Et al., Defendants. Petition. District Court, State of Oklahoma, County of Muskogee. Filed Feb. 17, 1916. C. H. Shaffer, Court Clerk. Blakney & Maxey and Grant Foreman, attorneys for plaintiffs.

50 That thereafter, and on the 17th day of February, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma, an Order which said Order is in words and figures as follows, to-wit:

51 STATE OF OKLAHOMA,
Muskogee County:

In the District Court.

W. A. HANCOCK et al., Plaintiffs,

VS.

THE CITY OF MUSKOGEE et al., Defendants.

The above entitled matter coming on for hearing this 17th day of February, 1916, upon the verified petition of the plaintiffs filed herein asking for a temporary restraining order and an order setting for hearing the plaintiffs' application for a temporary injunction and the Court being fully advised in the premises finds: that said order should be granted.

It is therefore by the Court considered, ordered and adjudged that the defendants, The City of Muskogee, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson and Charles Wheeler, Jr., and each of them, are hereby timporarily restrained from proceeding to execute and deliver to F. P. McCormick or anyone for him, or his assignee, or any other person, any bond or evidence of indebtedness or liability against the property of the plaintiffs located and situate in Sewer District No. 12, City of Muskogee, as described in plaintiffs' petition, and is restrained from collecting or attempting to collect the special assessment or assessments as alleged in plaintiffs' petition, or to pass or consider any ordinance to
52 that end and from certifying any special assessment to the County Treasurer or any other officer, or from taking any other proceedings or actions sought to be enjoined in the plaintiffs' petition, and that the said defendants, and each of them are hereby ordered and directed to be and appear before this Court on the 29 day of February, 1916, and there to show cause if any they have why a temporary injunction should not be granted herein temporarily enjoining the said defendants as prayed in the plaintiffs' petition and that pending said hearing on such temporary injunction these defendants and each of them are hereby temporarily restrained as above stated.

R. P. DE GRAFFENRIED,
District Judge.

53 *Sheriff's Return.*

STATE OF OKLAHOMA,
County of Muskogee, ss:

I received this Order on the 17th day of February, 1916, and served the same on the within named corporation on the 17th day

of February, 1916, A. D., at 10:20 o'clock A. M., of said day, by then and there delivering a true copy thereof to,

Franklin Miller, the Mayor of the City of Muskogee, Oklahoma, a Corporation,

J. W. Boen, the Commissioner of Finance, of the city of Muskogee, Oklahoma, a corporation,

James King, the Commissioner of Public Works of the City of Muskogee, Oklahoma, a corporation,

Joe McCusker, the Commissioner of Water, Lights, and Sewer of the City of Muskogee, Oklahoma, a corporation,

W. N. Patterson, the Commissioner of Public Safety of the City of Muskogee, Oklahoma, a corporation

Chas. Wheeler, Jr., the City Clerk of the City of Muskogee, Oklahoma, a corporation

and persons in charge of the business of said corporation at Muskogee, Oklahoma, in Muskogee County, State of Oklahoma, at the office and general place of business of the said corporation, in the said County and State; and I further certify that neither the President, Chairman of tye Board of Trustees or Directors, nor other Chief Officer, Cashier, Treasurer, or Secretary, nor other managing agent of said corporation were found in my said County, and
54 I further certify that there has been no agent appointed by the said Corporation in thsi County upon which service shall be made, as provided by law.

Witness my hand this 17th day of February, 1916.

JNO. S. BARGER,
Sheriff,

By WARREN BUTZ,
Deputy.

Sheriff's Fees.

Service and return, 1st person	$.50
Five additional persons	1.25
Five copies	1.25
Total	2.75

Endorsed on back as follows: No. 4690. W. A. Hancock et al., Plaintiffs, vs. the City of Muskogee et al., Defendants. Order. District Court? State of Oklahoma, County of Muskogee. Filed Feb. 17, 1916/ C. H. Shaffer, Cou-t Clerk.

55 That thereafter, and on the 17th day of February, 1916, there was filed in the office of the Court Clerk of Muskogee County, State of Oklahoma, a Summons which said Summons is in words and figures as follows to-wit:

56 *Summons.*

STATE OF OKLAHOMA,
County of Muskogee, ss:

In the District Court of Muskogee County, State of Oklahoma, Third Judicial District.

District Court, No. 4690, Original.

The State of Oklahoma to the Sheriff of Muskogee County, in said State, Greeting:

You are hereby commanded to notify The City of Muskogee, Okla.; Franklin Miller; J. W. Boen; James King; Joe McCusker; W. N. Patterson and Chas. Wheeler Jr., City Clerk that they have been sued by W. A. Hancock et al. in the District Court sitting in and for said County of Muskogee, and that unless they answer by the 11th day of March, A. D. 1916, the petition of the said plaintiffs against them filed in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this Summons on the 19th day of February, A. D. 1916.

Witness my hand and seal of said Court affixed at my office in Muskogee, Oklahoma this 16th day of February, A. D. 1916.

C. H. SHAFFER,
Court Clerk,
By TOM L. FULLER,
Deputy.

Suit brought for Injunction.

57 If the defendant fail to answer, judgment will be taken for the sum of $— with interest at the rate of — per cent per annum, from the — day of —, 191—, and cost of suit.

C. H. SHAFFER,
Court Clerk.

[SEAL.]

STATE OF OKLAHOMA,
Muskogee County, ss:

Received this Writ Feb'y 17, 1916, and as commanded therein, I summoned the following persons of the defendants within named at the time following, to-wit:

Franklin Miller, 10:20 A. M. Feb'y 17, 1916.
J. W. Boen, 10:20 A. M. Feb'y 17, 1916.
James King, 10:20 A. M. Feb'y 17, 1916.
W. N. Patterson, 10:20 A. M. Feb'y 17, 1916.
Joe McCusker, 10:20 A. M. Feb'y 17, 1916.
Chas. Wheeler Jr. 10:20 A. M. Feb'y 17, 1916.

by delivering to each of said defendants, personally, in said County,

a true copy of the within summons, with all the endorsements thereon.
by leaving for each of said defendants, at — usual place of residence of each in said County, a true and certified copy of the within Summons, with all the endorsements thereon, with a member of his family over 15 years of age-

The following persons of the defendants within named not found in said County.

Sheriff's Fees.

58	Service and return, first person.....	$.50
	Serving 6 additional persons.....	1.50
6 copies.....		1.50
Mileage — miles.....		
Nor found —.....		
Total		$3.50

JNO. S. BARGER,
Sheriff,
By WARREN BUTZ,
Deputy.

STATE OF OKLAHOMA,
County of Muskogee, ss:

Return.

I received this Summons on the 17th day of February, A. D. 1916, and served the same on the within named corporation on the 17th day of February A. D. 1916 at 10:20 o'clock A. M. of said day, by then and there delivering a true and certified copy thereof to Franklin Miller the Mayor of City of Muskogee, Oklahoma and person in charge of the business of the said corporation at Muskogee in Muskogee County, State of Oklahoma, at the office and general place of business of the said corporation, in said County and State; and I further certify that neither the president, Chairman of the Board of Trustees or Directors, nor other Chief Officer, Cashier, Treasurer, Secretary or Clerk, nor other managing agent of said corporation were found in my said county; and I further certify that there has been no agent appointed by the said corporation in this County upon whom service shall be made, as provided by law.

59 JNO. S. BARGER,
Sheriff,
By WARREN BUTZ,
Deputy.

Fees $3.50.

Endorsed on back as follows: No. 4690. Summons. W. A. Hancock et al., Plaintiff, vs. The City of Muskogee et al., Defendant.

District Court. State of Oklahoma, County of Muskogee. Filed Feb. 17, 1916. C. H. Shaffer, Court Clerk. Blakney & Maxey, Attorney- for Plaintiff.

60 That thereafter, and on the 17th day of February, 1916, there was filed in the office of the Court Clerk of Muskogee County, State of Oklahoma a præcipe for Summons, which said Præcipe for Summons is in words and figures, as follows, to-wit:

61 *Præcipe for Summons.*

In the District Court of Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al.

vs.

THE CITY OF MUSKOGEE et al.

To the Clerk of Said Court:

Issue Summons in the above entitled cause, and direct the same to the Sheriff of Muskogee County, State of Oklahoma, to or for the Defendant The City of Muskogee, Okla. Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson & Chas. Wheeler Jr. City Clerk.

Amount Claimed $— and — interest from — day of —, 191—, at — per cent per annum.

Action brought for injunction.

Defendants required to answer on or before the 11th day of M'ch, A. D. 1916.

Make summons returnable 19 day of Feb. 1916.

Dated this 16 day of Feb. A. D., 1916.

BLAKENEY AND MAXEY,
Attorneys for Plaintiffs.

(Endorsed:) No. 4690. Præcipe for Summons. District Court, Muskogee County. W. A. Hancock et al. vs. City of Muskogee, Okla. District Court. State of Oklahoma, County of Muskogee. Filed Feb. 17, 1916. C. H. Shaffer, Court Clerk.

62 That thereafter, and on the 29th day of February, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma, an Order which said Order is in words and figures as follows, to-wit:

63 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

THE CITY OF MUSKOGEE et al., Defendants.

Order.

The above entitled matter coming on to be heard this 29th day of February, 1916, the Plaintiffs appearing by their attorneys, Blakney & Maxey and Grant Foreman, and Defendants appearing by their attorney Charles Bagg. Thereupon the attorney for the defendants announces that they are unable to proceed at this time with the hearing of the Plaintiffs' application for a temporary injunction and asks that the same be adjourned and continued until the 9 day of M'ch, 1916; and the plaintiffs thereupon agree to said continuance upon the condition that the temporary restraining order heretofore granted by continued in force until a hearing on the plaintiffs' application for temporary injunction.

And the Court finding that an order should be made continuing said hearing until the said 9 day of M'ch, 1916, and continuing said restraining order heretofore granted,

64 It is, therefore, by the Court considered, ordered and adjudged that the hearing on Plaintiffs' application for a temporary injunction be, and the same is hereby continued until the 9 day of M'ch, 1916; that the restraining order heretofore issued on the 17 day of Feb. 1916, be, and the same is, hereby continued in full force and effect until the final hearing on the plaintiffs' application for a temporary injunction. And that pending said hearing the said defendants, and each of them, are restrained from performing any of the acts or doing any of the things which they were restrained from doing by the original restraining order issued herein.

R. P. DE GRAFFENRIED,
District Judge.

Endorsed on back as follows: W. A. Hancock et al., P't'ffs, vs. The City of Muskogee et al., D'f'ts. Order. District Court. State of Oklahoma, County of Muskogee. Filed Feb. 29, 1916. C. H. Shaffer, Court Clerk.

65 That thereafter, and on the 9th day of March, 1916, there was filed in the office of the Court Clerk of Muskogee County, State of Oklahoma, an Application to Amend by Making New

Parties Plaintiff, which said application is in words and figures, as follows, to-wit:

66 STATE OF OKLAHOMA,
Muskogee County.

In the District Court Thereof.

No. ——.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Application to Amend by Making New Parties Plaintiff.

Comes now the Plaintiffs in the above entitled cause and W. W. Bibb, C. A. Lockard, Hazel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey, J. E. Lyles, R. T. Payne, Priscilla Mackey, J. E. Winans, W. M. Newbold, C. M. Whaley, Ernest Price, J. B. Fue, Holly Luther, J. B. Fue, W. H. Carson, Thos. Kenney, J. H. Kennedy, P. E. Heckman, Edward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcombe, W. S. Irvin, C. A. Looney, Ben. D. Moore, E. Hastings, J. N. Franklin, W. P. Fields, J. W. Quarles, A. G. Harmon, Robert Wrigley, Martha H. Moore, Chas. Nelson, Alma Leach, C. T. West, M. L. Gurton, Washington Trust Company, Vine Truman, B. E. Sperry, O. A. Wright, John W. Morton, J. H. Kennedy, E. J. Hodges, W. B. Riley, Hugh A. King, G. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, Ella Mallow, Rachel Slagle and ask leave to make the last above named persons as parties plaintiff and for leave for the said parties to file an
67 amendment to Plaintiff's petition heretofore filed making them parties hereto and allege and show to the Court:

I.

That the above parties last above named are the owners of the property set opposite their names which has been assessed by the Defendants herein for the improvement set forth in the Plaintiffs' petition for the following amounts, to-wit:

Name.	Lot.	Block.	Addition.	Assessment.
W. W. Bibb	4	146	City	51.32
C. A. Lockard	3	201	City	51.32
Hazel E. Chapman	12	111	"	51.32
Madge Barnes	16	9	Garrett Heights	51.32
W. M. Morris	1-2-3	1	Higgins Add.	153.96
G. W. Maxey	1-2-8-9-10-11-12	131	City	359.24
J. E. Lyles and	N. 50 S. 160 W. 150			
R. T. Payne	N. 50 S. 110 W. 150	107	City	153.96
Priscilla Mackey	20	6	Findlay	51.32
J. B. Winans	3	4	Garrett Heights	51.32

Name.	Lot.	Block.	Addition.	Assessment.
W. M. Newbold	11	111	City	51.32
C. M. Whaley	6 & 7	12	Alta Vista	102.64
Ernest Price	16	5	" "	51.32
J B. Fue, Holly Luther	4	131	City	51.32
J. B. Fue, W. H. Carson	5	131	"	51.32
J. B. Fue, Holly Luther	6	131	"	51.32
Thos. Kenney	N. 40' & 7 & N. 40' 8	139	"	102.64
J. H. Kennedy	3	5	Highland	51.32
P. E. Heckman	5-6-8-10-11-12	146	City	307.92
68				
Edward S. Smith	3 & 4	8	Higgins	51.32
E. R. Rulison	11	147	City	51.32
L. S. Lowe	10	7	Garrett H'ghts	51.32
Lon Holcombe	4	6	" "	51.32
W. S. Irvin	4-5-6	120	" "	153.96
C. A. Looney	E. ½ Lot 4 and Lot 5	175	City	76.98
Ben D. Moore	8-9-10	142	"	153.96
E. Hastings	1-2-3	120	"	153.96
J. N. Franklin	S. 50 ft. 10 S. 50 ft. 11 S. 50 ft. 12	143	"	51.32
W. P. Fields	S. 40 ft. 6			
	S. 60 ft. W. 100 6	201	"	76.98
J. W. Quarles	1 & 2	7	Higgins Add.	
"	⅔ 30 ft. 3	7		128.30
A. C. Harmon	E. ½ 5	2	Highland	51.32
Robert Wrigley	S. 100- E. 150	107	City	102.64
Martha H. Moore	N. 60 S. 160 E. 150	107	"	76.98
Chas. Nelson	1 & 2	2	Highland	102.64
Alma Leach	N. 50' 1			
	N. 50' E. 40- 2	177	City	51.32
C. T. West	8	175	"	51.32
M. L. Gurton	6	147	"	51.32
Washington Trust Co.	S. ½ 6	198	City	51.32
Vine Truman	11	4	Alta Vista	51.32
B. E. Sperry	6	8	" "	51.32
O. A. Wright	4	1	Higgins A.	51.32
John W. Morton	4	2	Deans Add.	51.32
J. H. Kennedy	9	146	City	51.32
69				
E. J. Hodges	S. ½ 3	200	City	51.32
W. B. Riley	S. ½ 5	200	"	51.32
Hugh A. King	3 & 4	5	Higgins	102.64
G. R. Spearman	5	6	Garrett H'ts	51.32
Hogan Bean	7	1	Deans Add.	51.32
Hattie Walker	1	2	" "	102.64
M. M. Holland	14-15-16-4	8	Garrett H'ts	205.28
Ella Mallow	1 & 2	147	City	102.64
Rachel Slagle	14 & 15	9	Garrett H'ts	102.64

That the said property of said parties in all and every part thereof is located within Sewer District No. 12 and is affected identically with the property of the original plaintiffs and the said parties stand in identically the same position with the original plaintiffs herein and they desire that their rights may be litigated in this case and that they may be made parties plaintiff and be permitted to litigate and determine their rights herein.

II.

The parties further show to the Court that at the time of the filing of the original petition herein these persons who now seek to be made parties plaintiff were not advised of the fact that this suit was contemplated or about to be filed or that the plaintiffs herein were contesting the matters and things set forth in their petition, or they would have joined the said parties in the beginning but had intended to file a separate and distinct suit seeking the same relief as
70 the original plaintiffs and also to file the said suit in the same form.

Wherefore, the Plaintiffs and the parties specially named herein ask that said parties so named be made parties plaintiff and that all of said parties be permitted to file an amendment to the original petition filed herein and that the said cause then proceed in the name of all said parties as plaintiffs.

BLAKENEY AND MAXEY &
GRANT FOREMAN,
Attorneys for Plaintiffs.

Endorsed on back as follows: No. 4690. W. A. Hancock et al., Plaintiffs, vs. City of Muskogee et al., Defendants. Application to Amend by Making New Parties Plaintiff. District Court, State of Oklahoma, County of Muskogee. Filed M'ch 9, 1916. C. H. Shaffer, Court Clerk.

71 That thereafter, and on the 9th day of March, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma, an Order Making New Parties and Permitting Amendment, which said Order is in words and figures as follows, to-wit:

72 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Order Making New Parties and Permitting Amendment.

The above entitled matter coming on for hearing this 9th day of March, 1916, upon the application of the Plaintiffs and the other parties named therein asking that such parties therein specially named be made parties plaintiff in this cause and that they, together

with the original plaintiffs, be permitted to file an amendment to the original petition; and the Court being fully advised in the premises finds that the said application should be granted.

It is therefore by the Court considered, ordered and adjudged that the following persons, be, and they are hereby made additional parties plaintiff in this action, to-wit:

W. W. Bibb, C. A. Lockard, Hazel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey, J. E. Lyles, P. T. Payne, Priscilla Mackey, J. E. Winans, W. M. Newbold, C. M. Whaley, Ernest Price, J. B. Fue, Holly Luther, W. H. Carson, Thos. Kenney, J. H. Kennedy, P. E. Heckman, Edward B. Smith, E. R. Rulison, L. S.
73 Lane, Lon Holcomb, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. N. Franklin, W. P. Fields, J. W. Quarles, A. C. Harmon, Robert Wrigley, Martha H. Moore, Chas. Nelson, Alma Leach, C. T. West, M. L. Gurton, Washington Trust Company, Vine Truman, B. E. Sperry, O. A. Wright, John W. Morton, J. H. Kennedy, E. J. Hodges, W. B. Riley, Hugh A. King, G. E. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, Ella Mallow, Rachel Slagle.

It is further considered, ordered and adjudged that the plaintiffs be, and they are hereby, given leave to file an amendment to their petition and that all pleadings heretofore or that *or that* may be hereafter filed by the defendants shall be considered as directed against the amendment to said petition as well as against the original petition.

R. P. DE GRAFFENRIED,
District Judge.

Endorsed on back as follows: No. 4690. W. A. Hancock et al., plaintiffs, vs. City of Muskogee et al., defendants. Order making new parties and permitting amendment. District Court, State of Oklahoma, County of Muskogee. Filed Mar. 9, 1916. C. H. Shaffer, court clerk.

74 That thereafter, and on the 9th day of March, 1916, there was filed in the office of the Court Clerk of Muskogee County, State of Oklahoma an Amendment to Petition which said Amendment to Petition is in words and figures, as follows, to-wit:

75 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

No. —.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Amendment to Petition.

Come now the Plaintiffs in the above entitled cause and, with leave of Court first had and obtained, file this their amendment to the original petition and in addition to all the matters and things alleged and set forth in the Plaintiffs' original petition allege and show:

1.

That W. W. Bibb, C. A. Lockard, Hazel E. Chapman, Madge Barnes, W. M. Morris, C. W. Maxey, J. E. Lyles, P. T. Mayne, Priccilla Mackey, J. E. Winans, W. M. Newbold, C. M. Whaley, Ernest Price, J. B. Fue, Holly Luther, W. H. Carson, Thos. Kenney, J. H. Kennedy, P. E. Heckman, Edward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcombe, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. N. Franklin, W. P. Fields, J. W. Quarles, A. G. Harmon, Robert Wrigley, Martha H. Moore, Chas. Nelson, Alma Leach, C. T. West, M. L. Gurton, Washington Trust Company, Vine Truman, B. E. Sperry, O. A. Wright, John W. Morton, J. H.
76 Kennedy, E. J. Hodges, W. B. Riley, Hugh A. King, G. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, Ella Mallow, Rachel Slagle are legal residents and tax payers of the City of Muskogee, State of Oklahoma, and owners of property located in Sewer District No. 12 in said City. That the said parties own property in said District which is assessed in the amounts set opposite their names as follows:

Name.	Lot.	Block.	Addition.	Assessment.
W. W. Bibb	4	146	City	51.32
C. A. Lockard	3	201	"	51.32
Hazel E. Chapman	12	111	"	51.32
Madge Barnes	16	9	Garrett H'ts	51.32
W. M. Morris	1-2-3	1	Higgins Add.	153.96
G. W. Maxey	1-2-8-9-10-11-12	131	City	359.24
J. E. Lyles and R. T. Payne	N. 50' S. 160' W. 150' N. 50' S. 110' W. 150'	107	"	153.96
Priscilla Mackey	20	6	Findley	51.32
J. E. Winans	3	4	Garrett H'ts	51.32
W. M. Newbold	11	111	City	51.32
C. M. Whaley	6 & 7	12	Alta Vista	102.64
Ernest Price	16	5	" "	51.32
J. B. Fue, & Holly Luther	4	131	City	51.32
J. B. Fue & W. H. Carson	5	131	"	51.32

Name.	Lot.	Block.	Addition.	Assessment.
J. B. Fue & Holly Luther	6	131	"	51.3
Thos. Kenny	N. 40' 7 / N. 40' 8	139	"	102.6
J. H. Kennedy	3	5	Highland	51.3
77				
P. E. Heckman	5-6-8-10-11-12	146	City	307.9
Edward B. Smith	3 & 4	8	Higgins	102.64
E. R. Rullson	11	147	City	51.3
L. S. Lowe	10	7	Garret H'ts	51.3
Lon Holcomb	4	6	" "	51.3
W. S. Irvin	4-5-6	120	City	153.9
C. A. Looney	E ½ 4 & Lot 5	175	"	76.9
Pen D. Moore	8-9-10	142	"	153.96
E. Hastings	1-2-3	220	"	153.9
J. N. Franklin	S. 50' 10 / S. 50' 11 / S. 50' 12	143	"	51.3
W. P. Fields	S. 40' 6			
	S. 60' W. 100 6	201	"	76.9
J. W. Quarles	1-2 & S. 30' 3	7	Higgins Add	128.3
A. G. Harmon	E. ½ 5	2	Highland	51.3
Robert Wrigley	S. 100 E. 150	107	City	102.6
Martha H. Moore	N. 60 S. 160 E. 150	107	"	76.9
Chas. Nelson	1 & 2	2	Alta Vista	102.64
Alma Leach	N. 50' 1, N. 50 E. 40 2	177	City	76.9
C. T. West	8	175	"	51.3
M. L. Gurton	6	147	"	51.3
Washington Trust Co.	S. ½ 6	198	"	51.3
Vine Truman	11	4	Alta Vista	51.32
B. E. Sperry	6	8	" "	51.32
O. A. Wright	4	1	Higgins	51.3
John W. Morton	4	2	Deans	51.32
J. H. Kennedy	9	146	City	51.3
E. J. Hodges	S. ½ 3	200	"	51.32
78				
W. B. Riley	S. ½ 5	200	City	51.32
Hugh A. King	3 & 4	5	Higgins	102.64
G. R. Spearman	5	6	Garrett H'ts	51.32
Hogan Bean	7	1	Dean	51.32
Hattie Walker	1	2	"	102.64
M. M. Holland	14-15-16-4	8	Garrett H'ts	205.28
Ella Mallow	1 & 2	147	" "	102.64
Rachel Slagle	14-15	9	Garrett H'ts	102.64

That the said parties last above named, and each of them, hereby adopt in toto the original petition filed herein as their petition and as their allegations and cause of action and claim a right, privilege and immunity under the fourteenth Amendment to the Constitution of the United States as alleged in their petition herein and ask this Court to pass upon said right, privilege and immunity and to grant them relief thereunder as prayed in said petition.

Wherefore, the Plaintiffs pray this Honorable Court for a temporary injunction against the City of Muskogee and the said defendants, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson and Charles Wheeler, Jr., and their successors in office, enjoining and restraining them from proceeding to execute and deliver to the said F. P. McCormicj, or any other person, any bond o

evidence of indebtedness or liability, against the property above described, or from collecting or attempting to collect such special assessment to pay charges hereinbefore set forht; or to pass or to
79 consider officially any ordinance or resolution to that end, or from certifying such special assessment to the County Treasurer or to any other officer upon the failure of the plaintiffs, or any of them to pay the charges against their property, and extend said injunction or restraining order against said defendants until the cost of the construction of said sewer shall have been taxed against all of the property in the City of Muskogee, so that the property of the plaintiffs described herein may be required to pay only its just share of such burden of taxation, and that on final hearing of said cause, said defendants be perpetually enjoined and restrained from enforcing the collection of said special assessment against the property of the plaintiffs hereinabove described, and that the plaintiffs have all other just and proper relief, and that the defendants be adjudged to pay the cost of this action.

BLAKNEY AND MAXEY &
GRANT FOREMAN,
Attorneys for Plaintiffs.

STATE OF OKLAHOMA,
Muskogee County:

Ben D. Moore, being duly sworn upon oath deposes and says: That he is one of the plaintiffs in the above entitled action; that he has carefully read the above and foregoing Amendment to Petition and knows the contents thereof and that the allegations and statements therein contained are true and correct.

BEN D. MOORE.

80 Subscribed and sworn to before me this 9th day of March, 1916.

[SEAL.] ETTA P. JULIAN,
Notary Public.

My commission expires July 13, 1918.

Endorsed on back as follows: No. 4690. W. A. Hancock, et al., Plaintiffs vs. City of Muskogee et al., Defendants. Amendment to Petition. District Court. State of Oklahoma, County of Muskogee. Filed Mar. 9, 1916. C. H. Shaffer, Court Clerk.

81 That thereafter, and on the 10th day of March, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma a Temporary injunction which said Temporary Injunction is in words and figures, as follows, to-wit:

82 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE, FRANKLIN MILLER, J. W. BOEN, JOE McCUSKER, Jas. King, W. N. Patterson, as Mayor and Commissioners of said City of Muskogee, and Charles Wheeler, Jr., City Clerk, Defendants.

Temporary Injunction.

The above entitled matter coming on for hearing this 9th day of March, 1916, pursuant to an order of this Court heretofore made upon the application of the Plaintiffs herein for a temporary injunction to restrain the said defendants from doing and performing all of the acts and things sought to be enjoined in the plaintiffs' petition filed herein, the plaintiffs appear by their attorneys, Blakney & Maxey and Grant Foreman, and the defendants, and each and all of them appear by their attorney Charles Bagg. And thereupon it is agreed by the parties by their respective attorneys that a temporary injunction may be granted as prayed in plaintiffs' petition and amendment thereto, pending the final determination of this suit.

It is therefore by the Court Considered, ordered and adjudged that the defendants, the City of Muskogee, Franklin Miller, Mayor,
83 J. W. Boen, James King, Joe McCusker and W. N. Patterson, Commissioners, and Charles Wheeler, Jr., City Clerk of said City of Muskogee, and their successors in office and each of them, are hereby temporarily enjoined pending the final hearing of this cause from proceeding to execute and deliver to F. P. McCormick, or anyone for him, or his assignee, or any other person acting under, by or through him, any bond or evidence of indebtedness or liability against the property of the plaintiffs, or either of them, located and situated in Sewer District No. 12, in the City of Muskogee, State of Oklahoma, as described in Plaintiffs' petition. And the said defendants and their successors in office and each of them are temporarily enjoined during the pending of this suit, from collecting or attempting to collect the special assessment or assessments against the property of these plaintiffs in Sewer District No. 12, City of Muskogee, as alleged in plaintiffs' petition or to pass or consider any ordinance to that end and are also enjoined from certifying any special assessment on said property for the construction of a storm sewer in said district to the County Treasurer or any other officer of this County, or from taking any other proceeding or action sought to be enjoined in the Plaintiffs' petition.

It is further considered, ordered and adjudged that the plaintiffs give an injunction bond conditioned as by law provided in the penal

sum of Five Hundred Dollars to be approved by the Clerk of this Court and upon filing and approval of said bond the said Defendants and each of them and their successors in office are hereby tem-
84 porarily enjoined as above recited without further service or other notice.

R. P. DE GRAFFENRIED,
District Judge.

O. K.
BLAKNEY & MAXEY,
Att'ys for P't'f.

CHAS. BAGG,
Att'y for Def'ts.

Endorsed on back as follows: No. 4690. W. A. Hancock, et al., Plaintiffs vs. City of Muskogee, et al., Defendants. Temporary Injunction. District Court. State of Oklahoma, County of Muskogee. Filed Mar. 10, 1916. C. H. Shaffer, Court Clerk.

85 That thereafter, and on the 10th day of March, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma, an Injunction Bond, which said Injunction Bond is in words and figures as follows, to-wit:

86 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Injunction Bond.

Whereas, the said Plaintiffs have obtained an order of injunction against the Defendants, the City of Muskogee, Oklahoma, Franklin Miller, as Mayor, and J. W. Boen, James King, Joe McCusker, and W. N. Patterson, Commissioners, and Charles Wheeler, Jr., City Clerk of said City of Muskogee, and their successors in office, in a civil action brought in said above entitled court wherein the above entitled parties are plaintiffs and defendants as set forth in said title:

Now, therefore, We the undersigned Principals and W. L. Mayes, and H. C. Bain as sureties hereby undertake in the sum of Five Hundred Dollars ($500.00) that the Plaintiffs shall pay to the said defendants any damages they may sustain, including a reasonable attorney's fee, by reason of the issuing of said injunction if it should be finally decided that the said injunction ought not to have been granted.

Dated the 10th day of March, 1916.

W. L. Hoffman, S. F. Stevens, J. C. Welch, Jeanette Langenberg, O. E. Swan, Isiah Davis, F. Simp-

87 son, C. F. Meadors, J. L. Haner, P. A. Gavin, W. H. Ely, W. A. Wilson, Jno. W. Brown, Grant Brown, W. D. Brewer, Wm. Ragsdale, J. L. Huff, Edith H. Brainard, Emma Wieland, Mrs. P. L. Brulingame, Henry Stebbins, W. A. Hancock, A. H. Sharum, J. M. McEntee, P. L. Snyder, Bessie Rowley, N. K. Farmer, Jno. T. Moore, E. W. Pitts, J. J. Pool, J. T. Lysle, Mr. Finley, B. E. Spivey, Ella Smith, Anderson Stewart, Franklin Garland, Robert Asquith, S. E. Coleman, Lucy Hassell, Mary Pitts, Susie H. Sharp, C. P. Bryant, A. R. Fair, W. C. Fair, R. D. Fair, Geo. Smith, David Russell, Geo. Wood, W. S. Dills, Ella Mallow, Rachel Slagle, G. R. Spearman, Hogan Bean, Hattie Walker, M. M. Holland, W. B. Pearson, Ida Grant, Elizabeth Cook, C. F. Bullard, H. P. Sager, J. H. Meton, C. A. Thompson, J. B. Parks, S. H. M. Young, J. A. Bell, Margaret Nagle, Ben H. Brown, W. H. Kremer, W. C. Garrett, L. S. Copeland, W. H. Rairdon, Susan Chadbourn, L. E. Tomm, J. *I.* Havice, T. T. Gaddy, J. F. Lawrence, C. Pridgeon, Dora H. Moorer, M. M. Lain, Chas. L. Reed, C. L. Chapman, Lon Robinson, H. C. Montague, Mr. Dotty, E. Page, C. H. Finnigan, Muskogee Nat'l Bank, C. M. Collins, C. M. Fullenweider, R. S. Marshall, Bent Cobb, J. B. Fue, J. W. Morton, Reuben Mayo, Lida B. Robe, J. M. Brucker, G. E. Burford, H. H. Atkins, Sady M. Lovell, L. F. Flamm, Una H. Tevis, J. M. Stout, C. J. Eddy, Ben Hall, H. L. Jolly, O. F. Beebe, Grant Foreman, Mrs. Pulliam, W. S. Bullard, Ophelia King, L. P. Bullard, Jno. F. Smith, Fred J. Wilhemeyer, J. T. Nichols, H. W. Gibson, U. L. Jackson, Wood Hurt, Guy Morrison, H. H. Carter, A. F. Hubbert, G. W. Smart, W. R. Emer-

88 son, Muskogee Gas & Electric Co., American Nat'l Bank, Priscilla Mackey, W. J. Quarles, D. H. Linebaugh, W. L. Biggs, F. E. Coss, J. M. Miller, Chas. Nelson, M. L. Gurton, C. T. West, C. A. Lockard, W. P. Fields, Washington Trust Co., Midland Valley Railroad Co., W. W. Bibb, Hazel E. Chapman, Madge Barnes, W. M. Morris, G. W. Maxey, J. E. Lyles, P. T. Payne, J. E. Winans, W. M. Newbold, C. M. Whaley, Earnest Price, Holly Luther, W. H. Carson, Thomas Kenney, J. H. Kennedy, P. E. Heckman, Edward B. Smith, E. R. Rulison, L. S. Lane, Lon Holcomb, W. S. Irvin, C. A. Looney, Ben D. Moore, E. Hastings, J. N. Franklin, W. P. Fields, J. W. Quarles, A. G. Harmon, Robt. Wrigley, Martha H. Moore, Chas. Nelson, Alma Leach, Vine Truman, B. E. Sperry, O. A. Wright, Jno. W. Morton, E. J. Hodges, W. B. Riley, Hugh A. King,

By BLAKNEY & MAXEY,
Their Attorneys, Principals.
W. L. MAYES, *Surety.*
H. C. BAIN, *Surety.*

I, W. L. Mayes, surety on the above bond being duly sworn on oath state that I am worth the sum of Five Hundred Dollars, over and above my liabilities, debts and exemptions.

W. L. MAYES.

Subscribed and sworn to before me this 10th day of March, 1916.

[SEAL.] ANNA B. KING,
Notary Public.

My commission expires Feb. 13/1918.

89 I, Harry C. Bain, surety on the above bond being duly sworn on oath state that I am worth the sum of Five Hundred Dollars over and above my liabilities, debts and exemptions.

H. C. BAIN.

Subscribed and sworn to before me this 10th day of March, 1916.

ANNA B. KING,
[SEAL.] *Notary Public.*

My commission expires Feb 13/1918.

The above undertaking and sureties thereto approved by me this 10th day of March, 1916.

C. H. SHAFFER,
Court Clerk, Muskogee County, Oklahoma.
By JOHN ZUFALL,
Deputy.

Endorsed on back as follows: No. 4690. W. A. Hancock et al., Plaintiffs, vs. City of Muskogee et al., Defendants. Injunction Bond. District Court. State of Oklahoma, County of Muskogee. Filed Mar. 10, 1916. C. H. Shaffer, Court Clerk.

90 That thereafter, and on the 11th day of March, 1916, there was filed in the office of the Court Clerk of Muskogee County, State of Oklahoma, a Demurrer, which said Demurrer is in words and figures as follows, to-wit:

91 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Demurrer.

Come now the Defendants in the above entitled cause and demur to the petition of the Plaintiffs heretofore filed in this cause and to the several allegations therein contained, upon the following grounds and for the following reasons, to-wit:

I.

Because said petition does not state facts sufficient to constitute a cause of action against these Defendants or either of them.

II.

Because this Court has no jurisdiction of the subject matter of the action.

III.

Because there is a defect of parties plaintiff.

IV.

Because there is a defect of parties Defendant.

V.

Because there are several causes stated in said petition which are improperly joined.

92 CHAS. BAGG,
S. V. O'HARE,
Attorneys for Defendants.

Endorsed on back as follows: No. 4690. W. A. Hancock et al., vs. City of Muskogee et al. Demurrer; District Court, State of Oklahoma, County of Muskogee: Filed Mar. 11, 1916. C. H. Shaffer, Court Clerk. Chas. Bagg, S. V. O'Hare, Attorneys for Defendants.

93 *Record of District Court, Muskogee County, Oklahoma.*

MONDAY, March 27, 1916, continued.

Court Met pursuant to adjournment. The Honorable R. P. de Graffenried, Judge, present and presiding, and present: Fred P. Branson, County Attorney; C. H. Shaffer, Court Clerk, and Jno. S. Barger, Sheriff.

And Court having been opened in due form of law, the following proceedings were had as follows, to-wit:

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Demurrer of the defendants to the petition of the plaintiffs heard and overruled. Defendants except and are allowed ten days to answer.

Whereupon, Court adjourned until nine o'clock tomorrow morning.

94 That thereafter, and on the 5th day of April, 1916, there was filed in the office of the Court Clerk of Muskogee County, State of Oklahoma, an Application to Amend by Making new Party Plaintiff, which said Application is in words and figures, as follows, to-wit:

95 STATE OF OKLAHOMA,
County of Muskogee:

In the District Court Thereof.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Application to Amend by Making New Party Plaintiff.

Comes now the Plaintiffs in the above entitled cause and Ralph E. Campbell and ask leave to make the said Ralph E. Campbell a party plaintiff and for leave for the said Ralph E. Campbell to file an amendment to the Plaintiff's petition heretofore filed making him a party hereto and allege and show to the Court,

I.

That the said Ralph E. Campbell is the owner of the Following described property which has been assessed by the Defendants herein for the improvements set forth in the Plaintiffs' petition for the following amount, to-wit:

Name.	Lot.	Block.	Addition.	Assessment.
Ralph E. Campbell	1 & 2	3	Alta Vista	$102.64.

That said property is located within Sewer district No. 12 and is affected identically with the property of the original plain-
96 tiffs, and that said party stands in identically the same position with the original plaintiffs herein and desires that his rights may be litigated in this case, and that he may be made a party plaintiff and be permitted to litigate and determine his rights therein.

II.

Said parties further show to the Court that at the time of the filing of the original petition herein, the said Ralph S. Campbell who now seeks to be made party plaintiff was not advised of the fact that this suit was contemplated or about to be filed, or that the plaintiffs herein were contesting the matters and things set forth in their petition, or he would have joined the said parties in the beginning, but had intended to file a separate and distinct suit asking the same relief as the original plaintiffs and also to file the said suit in the same form.

Wherefore, the plaintiffs and the party specially named herein ask that said Ralph E. Campbell be made a party plaintiff and that all of said parties be permitted to file an amendment to the original petition as amended and that the said cause then proceed in the name of all of said parties as plaintiffs.

GRANT C. FOREMAN,
BLAKNEY & MAXEY,
Attorney- for Plaintiffs.

(Endorsed:) No. 4690. W. A. Hancock et al., P't'ffs. vs. City of Muskogee et al., D'f'ts. Application to amend by making new party plaintiff. District Court, State of Oklahoma, County of Muskogee. Filed Apr. 5, 1916. C. H. Shaffer, court clerk.

97 That thereafter, and on the 5th day of April, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma, an Order making new parties plaintiff and permitting amendment, which said Order is in words and figures as follows, to-wit:

98 STATE OF OKLAHOMA,
County of Muskogee:

In the District Court Thereof.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Order Making New Parties Plaintiff and Permitting Amendment.

The above *ne*titled matter coming on for hearing this 5 day of April, 1916, upon the application of the plaintiffs and the other party named therein that such party therein specially named be made a party plaintiff in this case and that he, together with the other plaintiffs, be permitted to file an amendment to the petition; and the Court being fully advised in the premises finds that the said application should be granted:

It is therefore by the Court considered, ordered and adjudged that Ralph E. Campbell be, and he is hereby made an additional party plaintiff in this action.

It is further considered, ordered and adjudged that the plaintiffs be, and they are hereby, given leave to file an amendment to their petition and amend thereto and that all pleadings heretofore or that may be hereafter filed by the defendants shall be considered
99 as directed against this amendment as well as against the original petition and the first amendment thereto.

R. P. DE GRAFFENRIED,
District Judge.

Endorsed on back as follows: No. 4690. W. A. Hancock et al. P't'ffs, vs. City of Muskogee et al., D'fts. Order making new parties plaintiff and permitting amendment. District Court, State of Oklahoma, County of Muskogee. Filed Apr. 5, 1916. C. H. Shaffer, Court Clerk.

99½ *Index.*

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100 That thereafter, and on the 5th day of April, 1916, there was filed at the office of the Court Clerk of Muskogee County, State of Oklahoma, an Amendment to Petition which said Amendment is in words and figures as follows, to-wit:

101 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Amendment to Petition.

Comes now the plaintiffs in the above entitled cause and with leave of court first had and obtained files this their amendment to the original petition and in addition to all the matters and things alleged and set forth in the plaintiffs' original petition and first amendment thereto allege and show:

That Ralph E. Campbell is a legal resident and tax payer of the City of Muskogee, State of Oklahoma and the owner of property located in Sewer District No. 12 in said City.

That he owns the following described property in said District which is assessid in the amount as follows:

Name.	Lot.	Block.	Addition.	Assessment.
Ralph E. Campbell	1 & 2	3	Alta Vista	$102.64

That the said Ralph E. Campbell hereby adopts in toto the original petition filed herein and the amendment thereto as his petition and as his allegations and cause of action, and claims a right,
102 privilege and immunity under the Fourteenth Amendment to the Constitution of the United States as alleged in said petition and amendment thereto and asks this Court to pass upon the right, privilege and immunity and to grant him relief as prayed in said petition.

Wherefore, the Plaintiffs prays this Honorable Court for a temporary injunction against the City of Muskogee and the said defendants, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson and Charles Wheeler, Jr., and their successors in office, enjoining and restraining them from proceeding to execute and deliver to the said F. P. McCormick, or any other person, any bond or evidence of indebtedness or liability, against the property above described, or from collecting or attempting to collect such special assessment to pay charges hereinbefore set forth; or to pass or to consider officially any ordinance or resolution to that end, or from certifying such special assessment to the County Treasurer or to

any other officer upon the failure of the plaintiffs, or any of them to pay the charges against their property, and extend said injunction or restraining order against said defendants until the cost of the construction of said sewer shall have been taxed against all of the property in the City of Muskogee, so that the property of the plaintiffs described herein may be required to pay only its just share of such burden of taxation, and that on final hearing of said cause, said defendants be perpetually enjoined and restrained from enforcing the collection of said special assessment against the property of the plaintiffs herein above described, and that the plaintiffs have
103 all other just and proper relief and that the defendants be adjudged to pay the cost of this action.

GRANT L. FOREMAN,
BLAKNEY & MAXEY,
Attorneys for Plaintiffs.

STATE OF OKLAHOMA,
Muskogee County:

J. H. Maxey, being duly sworn on oath deposes and says:

That he is one of the attorneys for plaintiff Ralph E. Campbell; that the facts stated in the above and foregoing amendment to petition are within the personal knowledge of affiant and that the said Ralph E. Campbell is on this date absent from Muskogee County and is in Tulsa County, Oklahoma.

That affiant has carefully read the above and foregoing amendment to petition and knows the contents thereof and that the allegations and statements therein contained are true and correct as affiant verily believes.

J. H. MAXEY.

Subscribed and sworn to before me this 4th day of April, 1916.

ETTA P. JILIAN,
[SEAL.] *Notary Public.*

My commission expires July 13, 1918.

104 Endorsed on back as follows: No. 4690. W. A. Hancock et al., Ptffs., vs. City of Muskogee et al., Defts. Amendment to Petition. District Court. State of Oklahoma, County of Muskogee. Filed Apr. 5 1916. C. H. Shaffer, Court Clerk.

105 That thereafter, and on the 5th day of April, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma an Order which said Order is in words and figures as follows, to-wit:

106 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Order.

Now on this 5 day of April, 1916, comes the Plaintiff, Ralph E. Campbell, and the other plaintiffs in this case and files an amendment to the petition heretofore filed asking a temporary injunction in favor of said Ralph E. Campbell and against the defendants as prayed in their original petition, and upon consideration the Court finds that said application should be granted:

It is therefore considered, ordered and adjudged that the temporary injunction heretofore granted on the 10 day of March, 1916, in favor of plaintiffs and against these defendants be, and the same is hereby, extended to and made in favor of the plaintiff, Ralph E. Campbell, and that the said defendants are temporarily enjoined from committing any of the acts complained of in the amendment to the petition filed this day, pending final determination of this cause.

R. P. DE GRAFFENRIED,
District Judge.

107 Endorsed on back as follows: No. 4690. W. A. Hancock, et al., Plaintiffs, vs. City of Muskogee et al., Defts. Order District Court. State of Oklahoma, County of Muskogee. Filed Apr. 5 1916. C. H. Shaffer, Court Clerk.

108 That thereafter, and on the 8th day of April, 1916, there was filed in the office of the Court Clerk of Muskogee County, State of Oklahoma a Demurrer which said Demurrer is in words and figures as follows, to-wit:

109 In the District Court of Muskogee County, Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Demurrer.

Comes now the defendants and demur to the petition herein as amended for the reason that the said petition does not state facts

sufficient to constitute a cause of action against the defendant-, or any of them, or to entitle the plaintiffs to the relief sought by them.

S. V. O'HARE,
CHAS. BAGG,
GIBSON & HULL,
Attorneys for Defendants.

(Endorsed:) No. 4690. W. A. Hancock, et al., vs. City of Muskogee, et al. Demurrer. District Court. State of Oklahoma, County of Muskogee. Filed Apr. 8, 1916. C. H. Shaffer, Court Clerk. S. V. O'Hare, Chas. Bagg, Gibson & Hull, Attorney- for Defendants.

110 That thereafter on the 24th day of April, 1916, the above cause came on for hearing in open court on the demurrer filed by the defendants to the plaintiffs' petition and amendments thereto, and the Court upon consideration of the same, sustains the said demurrer, to which the plaintiffs except. The plaintiff refusing to plead further, the Court dismisses plaintiff's petition for want of equity, to which the plaintiffs except and prays an appeal to the Supreme Court. Plaintiff upon application is given time in which to make and serve a case-made and judgment entered for the defendants, to which plaintiffs except all as per journal entry.

111 That thereafter, and on the 26th day of April, 1916, there was filed and recorded in the office of the Court Clerk of Muskogee County, State of Oklahoma, a Journal Entry which said Journal Entry is in words and figures as follows, to-wit:

112 STATE OF OKLAHOMA,
Muskogee County:

In the District Court Thereof.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

THE CITY OF MUSKOGEE et al., Defendants.

Journal Entry.

The above entitled matter coming on for hearing this 24th day of April, 1916, upon a demurrer filed by the defendants to the plaintiffs' petition and amendments thereto, the plaintiffs appearing by their attorneys Blakney & Maxey and Grant Foreman, and the defendant appearing by their Attorney W. J. Crump, and the Court after hearing the argument of counsel and being fully advised in the premises finds that said demurrer to the plaintiffs' petition and amendments thereto should be sustained, and that the temporary injunction heretofore issued should be discharged.

It is therefore by the Court considered, ordered and adjudged that

the defendants' demurrer to the plaintiffs' petit.. and amendments thereto be, and the same is hereby, sustained, to which the plaintiffs except.

The plaintiffs thereupon state in open court that they elect to stand upon their said petition and amendments and refuse to plead
113 further and the Court dismisses said petition with prejudice for want of equity, to which the plaintiffs except.

The temporary injunction heretofore issued is discharged to which the plaintiffs except and pray an appeal to the Supreme Court which appeal is granted and upon application the plaintiffs are given fifteen days from this date to make and serve case-made, the defendants given five days after the service of said case-made within which to suggest amendments thereto, same to be settled on two days' notice to either party the petition in error to be filed in the Supreme Court within twenty-eight days from this date; and during such time execution of this order is suspended and until the decision of the case upon the petition in error if the same shall be filed.

The undertaking heretofore given upon the allowance of the temporary injunction shall be and remain in full force and effect and the order discharging the said temporary injunction is suspended for a period of twenty-eight days pending the filing of the petition in error by the plaintiffs in the Supreme Court and thereafter if said petition in error is filed, and if the same is so filed the order discharging said temporary injunction shall remain suspended pending the final determination of the said petition in error by the Supreme Court and the said temporary injunction shall be and remain in effect.

R. P. DE GRAFFENRIED,
District Judge

O. K.

114 BLAKNEY AND MAXEY.
GRANT FOREMAN.
W. J. CRUMP.

Endorsed on back as follows: No. 4690. W. A. Hancock, et al P't'ffs, vs. The City of Muskogee, et al., D'f'ts. Journal Entry. District Court. State of Oklahoma, County of Muskogee. Filed Apr. 26, 1916. C. H. Shaffer, Court Clerk.

115 The above and foregoing sets out fully and correctly all pleadings filed in said cause, all motions filed and made, and all rulings and orders made thereon; all exceptions taken by the plaintiff and the defendant to such rulings and orders; the judgment of the Court thereon, and exception of plaintiff thereto; and the same is a true and correct statement and complete transcript of all the pleadings, motions, findings, judgments and proceedings in said cause, and exceptions thereto.

116 In the District Court in and for Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Certificate of Attorney.

I hereby certify that the foregoing case-made contains a full, true, correct and complete copy ond transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete case-made.

Witness my hand this 2 day of May, 1916.

GRANT FOREMAN &
BLAKENEY AND MAXEY,
Attorneys for Plaintiffs.

117 In the District Court in and for Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Acceptance of Service.

We, the undersigned attorneys for the defendant, in the foregoing suit, certify that the foregoing case-made was duly served on us this 2nd day of May, 1916.

W. J. CRUMP,
Attorneys for Defendants,
City Attorney of Muskogee, Okla.

118 In the District Court in and for Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Stipulation of Attorneys.

It is hereby stipulated and agreed by and between the parties hereto, that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings fi-ed and proceedings had, all the orders and rulings made and exceptions allowed and all of the records upon which the judgment and journal entry in said cause were made, and same is-a full, true, correct and complete case made; and the said defendant waives the right to suggest amendments to said case made and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the plaintiff that the Judge of said court settle the same and order the same certified to by the Court Clerk, and filed according to law, and said defendant hereby waives the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

Dated May 9, 1916.

W. J. CRUMP,
Attorneys for Defendants.
GRANT FOREMAN AND
BLAKENEY AND MAXEY,
Attorneys for Plaintiffs.

Filed May 15, 1916. William M. Franklin, Clerk.

119 In the District Court of Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

CITY OF MUSKOGEE et al., Defendants.

Certificate of Trial Judge.

This is to certify that the foregoing above case-made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested and the same duly submitted

to me for settlement and signing, as required by law, by the parties in said cause; that the same as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, findings, proceedings and judgments had in such cause, and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the Court Clerk of this court attest the same with the seal of said court, and file the same of record.

Witness my hand at Muskogee this 9th day of May, 1916.

R. P. DE GRAFFENRIED,
Judge.

[SEAL.]

C. H. SHAFFER,
Court Clerk.
By JOHN ZUFALL,
Deputy,

District Court. State of Oklahoma, County of Muskogee. Filed May 9, 1916. C. H. Shaffer, Court Clerk.

120 In the District Court of Muskogee County, State of Oklahoma.

No. 4690.

W. A. HANCOCK et al., Plaintiffs,

vs.

THE CITY OF MUSKOGEE et al., Defendants.

Certificate of Transcript.

I, C. H. Shaffer, Court Clerk in and for Muskogee County, State of Oklahoma, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings, proceedings and record had, taken, filed, and made in the said cause, wherein W. A. Hancock et al., are plaintiffs and the City of Muskogee et al., are defendants, as the same appear from the record and files of my office.

Witness my hand and the seal of said Court this 9th day of May, 1916.

[SEAL.]

C. H. SHAFFER,
Court Clerk Muskogee County,
State of Oklahoma.
By JOHN ZUFALL,
Deputy.

District Court. State of Oklahoma, County of Muskogee. Filed May 9, 1916. C. H. Shaffer, Court Clerk.

121 And thereafter, on June 27th 1916, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause, to-wit:

Supreme Court, April Term, 1916, June 27th, 1916, Twenty-Sixth Judicial Day.

8315.

W. A. HANCOCK et al., Plaintiffs in Error,

v.

CITY OF MUSKOGEE et al., Defendants in Error.

And now on this day it is ordered by the court that the above cause be advanced and set for hearing at next assignment of cases.

122 And thereafter, on September 14th 1916, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause, to-wit:

Supreme Court, July Term, 1916, September 14th, 1916, Fifteenth Judicial Day.

8315.

W. A. HANCOCK et al., Plaintiffs in Error,

v.

CITY OF MUSKOGEE et al., Defendants in Error.

And now on this day the above cause is argued orally and the cause is submitted, on the record, briefs and oral argument.

123 And thereafter, on May 29th, 1917, in the Supreme Court of Oklahoma, the following proceedings were had in said cause, to-wit:

Supreme Court, April Term, 1917, May 29th, 1917, Nineteenth Judicial Day.

8315.

W. A. HANCOCK et al., Plaintiffs in Error,

v.

CITY OF MUSKOGEE et al., Defendants in Error.

And now on this day the above cause is argued orally and submitted on the record, briefs and oral argument.

124 And thereafter, on July 24th 1917, in the Supreme Court of Oklahoma, the following proceedings were had in said cause to-wit:

Supreme Court, July Term, 1917, July 24th, 1917, Eleventh Judicial Day.

8315.

W. A. HANCOCK et al., Plaintiffs in Error,

vs.

CITY OF MUSKOGEE et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

Opinion by Hooker, C.

By the COURT:

It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

125 Filed Jul- 24, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

Supreme Court Commission, Division Number Three.

8315.

W. A. HANCOCK et al., Plaintiffs in Error,

v.

CITY OF MUSKOGEE et al., Defendants in Error.

Syllabus.

1. Under chapter 15, article 15, Comp. Laws, 1909, the passage and publication of the ordinance, of necessity, pursuant to section 989 of said act, confers jurisdiction upon the municipal authorities of cities having a population of not less than one thousand persons to establish a sewer district and construct a district sewer therein, and to provide that the cost of such district sewer shall be apportioned against all the lots or pieces of ground in such district, exclusive of the public highways, and to levy and assess a special tax by ordinance against each lot or piece of ground within the district to pay for the construction of such sewer.
2. The publication of the ordinance provided by the act above quoted is a sufficient notice to the property owner of all facts therein contained, and the notices had here constituted due process of law.

Error from the District Court of Muskogee County.

R. P. de Graffenried, Judge.

B. B. Blakeney, J. H. Maxey, and Grant Foreman, for Plaintiffs in Error.

Chas. A. Moon, for Defendants in Error.

Affirmed.

126 HOOKER, C.:

On the 12th day of September, 1910, the governing body of the City of Muskogee passed and published an ordinance creating sewer district No. 12 therein; providing for the construction of a sewer, adopting plans, etc., prescribing the dimensions and material to be used in the construction of the same, together with a complete estimate of the cost thereof. Thereafter, the city engineer's specifications, profiles, plats, and estimates of cost were duly approved and the city clerk was directed to and did advertise for bids for the construction thereof for ten consecutive days, and the work was completed; and thereafter certain individuals instituted a suit seeking to enjoin various assessments upon certain property, alleging among other things that the law of Oklahoma under which the sewer in district No. 12 was constructed was unconstitutional and void, because it imposed an assessment for local improvements without notice to or an opportunity to be heard on the part of the parties to be assessed and whose property was affected by the construction thereof.

This court in the case of the City of Muskogee et al., v. Rambo et al., 40 Okl. 672, said:

"In the City of Perry v. Davis, et al supra, Mr. Justice Garber, who delivered the opinion for the court, on the question of notice, said:

'Thus we see that the property owners of sewer district No. 1, in the city of Perry were notified: First, by the publication of the ordinance creating the district, stating that it was deemed necessary for sanitary purposes, and that a sewer would be constructed
127 therein according to certain regulations set out in the ordinance; second, by the publication for ten consecutive days in a newspaper of general circulation in the city of Perry of the notice for bids for the construction of the sewer; third, the publication for four consecutive weeks of the ordinance levying and assessing the tax. Sufficient notice was therefore given to the defendants in error in this case, who were all residents of the city of Perry, affording them opportunity to protect their rights before the tax levied became a fixed charge or lien against their property.'

"The same may be said of the property owners who are parties to the instant suit. In speaking of the remedies available to the property owners and their duty to *pru*sue the same promptly upon receiving such notice, the learned Justice said:

'It was the plain duty of the defendants in error, upon the publication of the ordinance creating the sewer district, or when they learned that labor and money were being expended in the actual

construction of the sewer, to vigorously oppose and protest against it; then was an opportune time to test, by injunction or other proceedings, the legality of the various steps being taken.'

"It was under the same statute construed in that case that the improvement herein involved was constructed. Indeed practically all the sewer systems in all the cities in this state were constructed under the same act, and the construction placed thereon in City of Perry v. Davis, et al., supra, has been accepted as final by
128 the bench and bar of Oklahoma, as a territory and as a state, for a great many years. Under the construction placed upon the act, the publication of the ordinance, of necessity, has been deemed sufficient notice to the property owners of all the facts therein contained, and injunction or other proceedings in the ordinary courts of general jurisdiction have been deemed to be their remedy if they have any complaints or objections to make to the validity of the proceeding under which the publication for the improvement is made. Neither the act itself nor the decision of the court fixes any specific time within which complaints or objections may be filed. But the decision unquestionably holds that the act under which the improvement was made constitutes due process of law; that the passage and publication of the ordinance, of necessity, in pursuance of the act, constitutes notice and confers jurisdiction upon the city authorities to perform the work and provide for the payment therefor; that it was the duty of the property owners, upon the publication of the ordinance creating the sewer district, or upon discovering that labor and money were about to be expended in the actual construction of a public work, which would tend to benefit their property, to promptly take action, by injunction or otherwise, against the proceedings providing for such improvements, if in their judgment they are irregular. * * * "

129 After the decision of this court in the case cited above, the plaintiffs in error here ins-tuted their suit in the district court of Muskogee County, seeking to enjoin the governing body of the City of Muskogee from executing or delivering any bond or liability against their property, or from collecting or attempting to collect any special assessment against said property or to pass or consider officially any ordinance or resolution to that end, or from certifying such special assessment to the county treasurer or any other officer upon their failure to pay for the same, for the payment to the contractors for building the sewer in district No. 12, of the City of Muskogee, and their main contention here is that the Oklahoma laws providing for the construction of sewers, same being sections 984 and to 993 of Snyder's Compiled Laws of 1909, under authority of which this sewer was built, and the ordinance passed, and all proceedings taken, are unconstitutional and void, because they undertake to take the property of plaintiff in error without due process of law; and it is further asserted that a law imposing an assessment for a local improvement without notice to, and a hearing or an opportunity to be heard on the part of the owner of the property to be assessed, deprives the property owner of his property without due process of Law.

130 With this contention we cannot agree, for this court has expressly held in the Rambo case, cited supra, that the law

in question was constitutional and that the plaintiffs in error had notice of the creation of said district by the publication of the ordinance and the advertisement for bids, which afforded them full opportunity to protect their rights before the tax levy became a fixed charge or a lien against their property.

Their further contention that they have had no opportunity to appear and to be heard in the matter of fixing their individual assessment is likewise untenable. The act in question provides that:

"As soon as any district sewer shall have been completed the city engineer or other officer having charge of the work shall compute the whole cost thereof which shall also include all other expense incurred by the city in addition to the contract price of the work, and shall apportion the same against all the lots or pieces of ground, in such district, exclusive of improvements, in proportion to the area of the whole district exclusive of the public highways, and such officer shall report the same to the commissioner and councilmen and the mayor and councilmen shall thereupon levy and assess a special tax by ordinance against each lot or piece of ground within the district."

The legislature fixed a mode of assessment which adjusts itself automatically and where after the cost of construction has been ascertained, the amount of the individual assessment is determined, not by a discretionary power, but by a math-metical calcu-
131 lation. The legislature said that the whole cost shall be apportioned against the lots in said district in proportion to the area, and it did not provide for the exercise of any discretionary power, equalizing board, or a board of appraisers, and the cases based upon statutes providing for the appraisement of benefits by a board clothed with discretionary power and with the jurisdiction to determine the amount of each individual assessment are not applicable here.

In the case of Gillette, vs. City of Denver, 21 Fed. 822, the court through Mr. Justice Brewer, said:

"Now, in this case, the tax is levied by the area; no question of value, no matter of judgment—a mere mathematical calculation; and of what earthly profit could it be to a taxpayer to have notice of that calculation? He can make it himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be. In the proceedings to assess this tax and to do the work, there are three steps: First, there is the making of the contract for the building of the sewer; second, there is the building of the sewer, the performing of the work; and, third, the mere mathematical calculation. * * * "

See also, French v. Barber Asphalt Co., 181, U. S. 324; Martin v. District of Columbia, 205 U. S. 135; Parsons v. District of Columbia, 170 U. S. 45; Lock Wood vs. City of St. Louis, 24 Mo. 20; City of St. Joseph vs. Farrell, 106, Mo. 477.

132 In Wagner v. Leser, pamphlet #3, January 1st, 1916, U. S. Sup. Ct, Advance Opinions, it is said:

"It is further urged, and much stress seems to be laid upon this point, that the complainant and others similarly situated were given no opportunity to be heard as to the amount of benefits conferred

upon them, and the proper adjustment of the taxes among property owners. But this question, like the other, is foreclosed by the former decisions of this court. This assessment, and the classification of the property to be improved, were fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot. We think such a tax, when levied by the legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution."

See also Spencer v. Merchant, 125, U. S. 345, The case of Alley v. Muskogee, 156 Pac. 315, is also decisive of the issues involved here.

It is to be further noticed here that the assessing ordinance was passed on the third day of December, 1915, and this suit was filed on the 17th day of February, 1916, which was more than
133 sixty days after the passage of the ordinance. This court in a number of cases has held that the statute of limitations can be raised by demurrer, but under the view that we have taken as to the constitutionality of the law involved here and of the creation of the sewer district complained of, it follows that the plaintiffs in error are not entitled to the relief for which they ask and the judgment of the lower court is therefore affirmed, denying to them and each of them the injunction sought.

134 And thereafter, on August 4th, 1917, in the Supreme Court of Oklahoma, the following proceedings were had in said cause, to-wit:

Supreme Court Proceedings.

8315.

W. A. HANCOCK et al., Plaintiffs in Error,

vs.

CITY OF MUSKOGEE et al., Defendants in Error.

And now on this Aug. 4, 1917, it is ordered by the court that plaintiff in error be given 10 days' addition al time in which to file petition for rehearing, and the mandate of this court in said cause is hereby stayed.

135 Filed in Supreme Court of Oklahoma Aug. 4, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 8315.

W. A. HANCOCK et al., Plaintiffs in Error,

vs.

CITY OF MUSKOGEE et al., Defendants in Error.

Petition for Rehearing.

Come now W. A. Hancock, et al., plaintiffs in error, and respectfully show that on the 24th day of July 1917, a decree and judgment was rendered by this court in the above entitled cause affirming the judgment of the District Court of Muskogee County, Oklahoma, in favor of the City of Muskogee, and others, and against the said W. A. Hancock and others.

Your petitioners respectfully represent that in said decision this court overlooked a proposition decisive of the case, as follows, to-wit:

The sewer law under consideration does not provide that notice and an opportunity to be heard shall be given to the property owners affected and the statute itself does not "determine the amount to be assessed for a given improvement and designate the lands and property benefitted thereby, upon which the assessment is to be made." The statute and the proceedings thereunder, are unconstitutional for that reason.

136 Your petitioners further show that said decision is in conflict with the following authorities which are controlling:

Wagner v. Siser, 239 U. S. 207, 60 L. ed. 230;
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027;
French v. Barber Asphalt Paving Co., 181 U. S. 223, 45 L. ed. 879;
Fallbrook Irrig. Dist. v. Bradley, 164, U. S. 112, 41 L. ed. 369;
Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270.

Argument.

The contention of the plaintiffs in error in this case is that the sewer law of the State of Oklahoma is unconstitutional for the reason that it does not provide an opportunity to the property owner to be heard upon the question of the benefits to his property and assessment to be made against it, and that the act itself does not determine what land is benefitted, or the amount it shall be assessed for a given improvement. In the case of Wagner v. Siser, 239 U. S. Page 207,

cited by this court in its opinion, the statute under discussion by the United States Supreme Court specifically provides that:

"The Appeal Tax Court for the City of Baltimore is authorized and directed by the act to proceed to classify and list for taxation, as provided by the act, for the year 1913, all landed property in the City of Baltimore which, on the first day of November, 1912, was in a situation to come under the requirements of either of said classes. Before classifying any property under the special tax provided in the act the Appeal Tax Court was required to give notice to the owner of the property, designating a certain time when the owner
137 might appear before the court and be heard with reference to the liability of his property for the tax, and the class to which it properly belonged. After having given the owner reasonable notice and an opportunity to be heard, the Appeal Tax Court is required to proceed to make the classification provided."

The presence of this provision in the statute giving the property owner notice and an opportunity to be heard relieves the statute from the objection to which we call attention in the Oklahoma Statute, and the United States Supreme Court very properly held that this statute was not obnoxious to the due process of law provision of the constitution. In this particular the statute under discussion in that case is not at all similar to the Oklahoma sewer law and could well be where the Oklahoma sewer law cannot.

In another important particular the statute under discussion in that case is not similar to the Oklahoma statute. As the United States Supreme Court said in that case:

"This assessment, and the classification of the property to be improved, were fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties be assessed at a certain sum per foot front. We think such a tax, when levied by the legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution."

"Taking the decisions in this court together, we think that it results that the legislature of a state may determine the amount to be assessed for a given improvement and designate the lands and property benefitted thereby, upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred."

138 The Oklahoma statute does not purport to determine the amount to be assessed and designate the lands and property benefitted thereby but confides this matter to the local city officials.

In French v. Barber Asphalt Paving Co. 181, U. S. 338, 45 L. ed. 887, the United States Supreme Court quoted as follows from Spencer v. Merchant, 125 U. S. 345:

"The lands might have been benefitted by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly un-

just, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of court- be final." * * *

"The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which, in its judgment by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action."

The court said further in that case:

"When the determination of the lands to be benefitted is intrusted to commissions, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine by the statute imposing the tax, what lands, which might be benefitted by the improvement, are in fact benefitted; and if it does so, its determina-
139 tion is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefitted or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefitted."

The court cited a former decision of the U. S. Supreme Court in the case of Fallbrook Irrig. Dist. vs. Bradley, 164 U. S. 112, 41 L. ed. 369, and quoted language from that opinion as follows:

"Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question."

After citing a number of authorities the court said further:

"It has been held in this court that the legislature has power to fix such a district for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district; and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax i. e., the amount of the tax which he is to pay."

Quoting further and getting nearer home to the case at bar, the court continues:

140 "But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited.

"Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken." (Citing prior decisions of the court.)

The court said further in that case, that the publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question, and gives them an opportunity to be heard before the board.

Any claim that in the case at bar the publication of the ordinance creating the sewer district was sufficient notice to the property owners, fails to take into account the fact that the statute and the proceedings thereunder did not authorize a hearing or the granting of any relief to interested persons, who by reason of such notice or otherwise might attempt to present themselves for the purpose of objecting thereto. Any notice, no matter how definite it might be, would avail nothing to the property owner because there is no legal authority to hear him or give him relief.

The Supreme Court quoted further from the case of Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, which involves the power of assessing land for public purposes in the District of Columbia. There it was held that Congress

"may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same
141 tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law."

In Wagner v. Siser, cited by this court, the Supreme Court of the United States in speaking of the contention that the complainants were given no opportunity to be heard as to the amount of benefits and their adjustments among the property owners, said that this question is controlled by the former decisions of the court.

The former decisions of the court are quite fully discussed in French v. Barber Asphalt Paving Company, supra, and all sustain the contention we make, that the property owner affected is entitled to notice and an opportunity to be heard unless the legislature upon its own inquiry determines the question which the property owner would be entitled to be heard on under a statute which commits any of these matters to local authority. For the court further said in Wagner vs. Siser:

"This assessment, and the classification of the property to be im-

proved, were fixed and designated by legislative act. It was decreed that the property which had been improved by paving theretofore, should, according to the width of paving in front of the respective properties, be assessed at a certain sum per foot front."

These sums were fixed by the statute at 5 cents per foot front for Class C, 10 cents for Class B and 15 cents for Class A. It is obvious that this statute is totally unlike the sewer law under discussion.

142 We think the decision of this court is in conflict with the decision in Coe v. Armour Fertilizer Works, 237, U. S. 412, 59 L. ed. 1027. This court in the opinion in the case at bar calls attention to the fact that "plaintiffs in error had notice of the creation of said district by the publication of the ordinance and the advertisement for bids, which afforded them full opportunity to protect their rights before the tax levy became a fixed charge or a lien against their property." We respectfully say that this statement is erroneous as applied to the facts pleaded. The statute authorized no notice to the property owners and no opportunity to be heard. The petition alleges the best of reasons why the property owners assumed that this sewer was to be paid for by the bond issue for which their property was liable. The ordinance which was published did not pretend to notify anyone how the sewer was to be paid for. It did not say the property would be liable as would an ordinance defining a paving district. No more did the advertisement for bids.

It must be remembered that public sewers and district sewers alike were required by statute to be established by ordinance; and no provision was made for giving notice in the ordinance of how the sewer was to be paid for. We respectfully submit that the ordinance was not notice, but if is had been, there was no opportunity offered the property owner to be heard; and if there had been an opportunity to be heard the statute would still be unconstitutional; for in the Coe case, supra, the court said, quoting from another special assessment case:

" 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing, the law must require notice to them, and give them the right to a hearing
143 and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

We believe that the propositions and distinction above considered were entirely overlooked by the court. And in view of the authorities cited we do not see how this feature of the case can be passed by with justice to the plaintiffs in error and we respectfully submit that the opinion of the court in this case should be withdrawn and a rehearing of this case ordered.

Respectfully submitted,

B. B. BLAKENEY,
J. H. MAXEY,
GRANT FOREMAN,
J. D. SIMMS,
Attorneys for Plaintiffs in Error.

144 And thereafter, on November 6th 1917, in the Supreme Court of Oklahoma, the following proceedings were had in said cause, to-wit:

Supreme Court, October Term, 1917, November 6th, 1917, Fifteenth Judicial Day.

8315.

W. A. HANCOCK et al., Plaintiffs in Error,

vs.

CITY OF MUSKOGEE et al., Defendants in Error.

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause, be, and the same is hereby denied.

145 I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 144 pages, numbered from 1 to 144 inclusive, is a true and complete transcript of the record and all proceedings in said Supreme Court in the case of W. A. Hancock, et al. vs. The City of Muskogee, et al., as the same remains upon the files and records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Oklahoma City, this 5 day of February, A. D. 1918.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma,
By REUEL HASKELL, JR.,
Deputy.

Endorsed on cover: File No. 26,333. Oklahoma Supreme Court. Term No. 360. W. A. Hancock et al., plaintiffs in error, vs. The City of Muskogee, Oklahoma, et al. Filed February 14th, 1918. File No. 26,333.

Supreme Court of the United States

W. A. HANCOCK, et al., Defendants in Error,

vs.

CITY OF MUSKOGEE, et al., Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR.

BENJAMIN S. BLAKENEY,
J. HARVEY MAXEY,
Tulsa, Okla.;
GRANT FOREMAN,
JAMES D. SIMMS,
Muskogee, Okla.,
Attorneys for Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 360.

W. A. HANCOCK, *et al.*, - - - *Plaintiffs in Error,*

vs.

CITY OF MUSKOGEE, *et al.*, - *Defendants in Error.*

BRIEF *of* PLAINTIFFS *in* ERROR.

Statement and Abstract of the Record.

This is an action originally instituted by the plaintiffs in error, who were plaintiffs below, against the defendants in error, who were defendants below, on the 17th day of February, 1916, in the District Court of Muskogee County, Okla., seeking to enjoin the defendants from executing or delivering any bond or evidence of indebtedness or liability against the property of the plaintiffs or from collection, or attempting to collect, any special assessment against

said property, or to pass or consider officially any ordinance or resolution to that end, or from certifying such special assessment to the County Treasurer of Muskogee County, Oklahoma, or any other officer, upon the failure of the plaintiffs to pay the same, for the payment to the contractors for building a storm sewer in Sewer District No. 12 of the City of Muskogee, Oklahoma. The petition appears on pages 1 to 30, inclusive, and is as follows:

"*State of Oklahoma, Muskogee County. In the District Court thereof. W. A. Hancock et al., plaintiffs,* v. *City of Muskogee, et al., defendants.*

PETITION.

"The plaintiffs complain of the defendants, and for cause of action:

"That the plaintiffs are legal residents and tax payers of said City of Muskogee, except the plaintiff the Midland Valley Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Arkansas; and that said railroad company is the owner of property located in sewer district hereinafter described.

"That the defendant, the City of Muskogee, is and at all times hereinafter mentioned was a municipal corporation and a body politic and corporate, and one of the legal divisions of the State of Oklahoma; that the defendant, Franklin Miller, is the duly elected and qualified Mayor of the said City of Muskogee, and that the de-

fendants, J. W. Boen, James King, Joe McCusker and W. N. Patterson, are the duly elected and qualified commissioners of the said City of Muskogee, and Charles Wheeler, Jr., is the duly appointed City Clerk; that the said City of Muskogee is and was at all said dates and times, duly constituted, existing and acting as a city in said state, with a city government duly organized under the laws of said state, and prior to September 12th, 1910, had a population of more than one thousand persons.

"That the plaintiffs are the owners of real estate in the City of Muskogee, hereinafter described.

"That neither the said City of Muskogee nor its Mayor and councilmen have ever caused a general sewer system to be established in said city as authorized by the Statutes of the State of Oklahoma found in Cr. 15, Snyder's Compilation, Article XVI, Sec. 984.

"That the City of Muskogee, by its Mayor and City Council, by Ordinance No. 613, duly passed September 12th, 1910, and approved September 13, 1910, and published on the 16th, 23rd, and 30th days of September, and the 7th day of October, 1910, did pretend to ordain and create a so-called storm sewer district No. 12, in the City of Muskogee, according to the description as set forth in said ordinance, which ordinance is in words and figures as follows, to-wit:

ORDINANCE No. 613.

"*An ordinance creating Sewer District No. 12 in the City of Muskogee, Oklahoma: provid-*

ing for the construction of a sewer therein; adopting plans, specifications, profile, plats, sections and complete estimate of cost of the City Engineer for the construction of said sewer: prescribing the dimensions and the material to be used in the construction of the same and declaring an emergency.

"*Whereas*, the Mayor and the Councilmen of the City of Muskogee, Oklahoma, deem it necessary to construct a district sewer within and to drain the district hereinafter described and created;

"Therefore, be it ordained by the Mayor and Councilmen of the City of Muskogee, Oklahoma;

"*Section 1.* There is hereby established and created Sewer District No. 12 of the City of Muskogee, Oklahoma, which shall comprise all of that portion of the said City of Muskogee, embraced within and bounded by the following lines, to-wit:

"Beginning at the center line of South Ninth Street at a point fifty (50) feet south of the North line of West Kalamazoo Street; thence westerly to and with the south line of West Kalamazoo Street to its intersection with the southeast line of the right-of-way of the St. Louis & San Francisco R. R.; thence westerly to the intersection of Dean Avenue with the northwest line of the right-of-way of the St. Louis & San Francisco R. R.; thence west with the center line of Dean Avenue to the center of South Junction Avenue; thence north with the center line of South Junction Avenue to a point opposite the center line of Estelle Avenue; thence west with

the center line of Estelle Avenue to a point opposite the center of the North and South alley in Block ten (10) Garret Heights; thence north with the center line of said alley to the center of Tennyson Avenue; thence west with the center line of Tennyson Avenue to a point opposite the center of the North and South alley in Block six (6) Garrett Heights; thence north with the center line of said alley to the center of Carolyn Avenue; thence west with the center of Carolyn Avenue to the center of South Twenty-fourth Street; thence north with the center line of South Twenty-fourth Street (a portion of which street is also known as Nineteenth Street); and North Twenty-fourth Street to a point opposite the center of the east and west alley in Block seven (7), Findley Heights; thence east with the center line of said alley and of the alley in block six (6), Findley Heights, to the center of North Twenty-first Street; thence south with the center line of North Twenty-first Street to the center of Denison Street; thence southeasterly with the center line of Denison street; thence to the center of North Seventeenth Street; then southwesterly with the center line of North Seventeenth Street to the center of Broadway; then southeasterly with the center line of Broadway to the center of North Sixteenth Street; then southwesterly with the center line of North Sixteenth Street to the center of West Okmulgee Avenue; thence southeasterly with the center line of West Okmulgee Avenue to the center of Fourteenth Street; thence southwesterly with the center line of South Fourteenth Street to the center of El-

gin Avenue; thence southeasterly with the center line of Elgin Avenue to the center of South Thirteenth Street; thence southwesterly with the center line of South Thirteenth Street to the center of Fremont Street; thence southeasterly with the center line of Fremont street to the center of South Twelfth Street; thence southwesterly with the center line of South Twelfth Street to a point opposite the center of the alley in Block one hundred and eleven (111), original townsite; thence southeasterly along the center line of said alley to the center of South Eleventh Street; thence southwesterly along the center line of South Eleventh Street to the center of Indianapolis Avenue; thence southeasterly with the center line of South Eleventh Street to the center of Indianapolis Avenue; thence southeasterly with the center line of Indianapolis Avenue to its intersection with the east line of Dean's addition, extended north; thence south to and with the east line of Dean's addition to the center of Jackson Avenue; thence southeasterly with the center line of Jackson Avenue to the center of South Ninth Street; thence southeasterly with the center line of South Ninth Street to the place of beginning.

"*Section 2.* There shall be constructed within and to drain the sewer district created by Section 1 of this ordinance a district sewer to be built of brick, concrete, vitrified brick, and vitrified tile pipe, which sewer shall be fifteen (15) inches in diameter at its extreme north and increasing in size to five (5) feet in diameter at its outlet, and all necessary laterals, inlets, catch-

basins, manholes and other appurtenances, all in accordance with the plans, specifications, profiles, plats and sections of the City Engineer now on file in his office, and which are hereby adopted and approved.

"*Section 3.* A complete estimate of the cost of the improvements contemplated by this ordinance heretofore prepared by the City Engineer and submitted at this time to the Council is hereby approved and ordered filed in the City Engineer's office, with the plans and specifications referred to in Section 2 of this ordinance.

"*Section 4.* The City Clerk shall advertise for at least ten (10) days in the Muskogee Daily Phoenix for sealed bids for the furnishing of the material and the performance of the work of constructing the said district sewer, which notice shall require each bidder to file with his sealed bid a check certified by some bank in the City of Muskogee for the sum of Five Thousand ($5,000) Dollars, payable to the City of Muskogee, to be forfeited if such bidder shall be awarded the contract for the improvement contemplated by this ordinance and shall fail to enter into the same and file the bonds hereafter required of him. The successful bidder shall with[in] ten (10) days after the award of the contract, enter into a bond running to the City of Muskogee, in the sum of approximately twenty-five (25) per cent of the contract price for the construction of said district sewer conditioned for the protection of the City and all property occasioned by the negligent execution of the work, and for the faithful construction of said district sewer in ac-

cordance with the provisions of his contract and in conformity to the plans, specifications, profiles, plats and sections referred to in Section 2 of this ordinance. S u c h advertisement shall state the time and place when the said bids will be received and when they will be opened by the Mayor and Councilmen; and shall also state that the Mayor and Councilmen expressly reserve the right to reject any and all bids, and to re-advertise for other bids when none of the bids are, in their judgment, satisfactory.

"*Section 5.* An emergency is hereby declared by reason whereof it is necessary for the immediate preservation of the p u b l i c peace, health and safety that this ordinance take effect upon and after its passage, approval and publication.

'Passed this 12th day of September, 1910,'

which description in said ordinance embraces approximately seventy city blocks and includes approximately sixty thousand lineal feet of property fronting on the public streets of said city.

"The plaintiffs further show that the above described property embraces the property of the plaintiffs herein.

"That thereafter, to-wit: on the 17th, 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29th and 30th days of September, 1910, the said City of Muskogee by its Mayor and Council advertised for bids for building a storm sewer or sewers in said alleged storm sewer district and which notice for bids, or notice to contractors as the same is styled, is as follows, to-wit:

NOTICE TO CONTRACTORS.

"The City Clerk of the City of Muskogee, Oklahoma, will receive sealed bids until 5 o'clock p. m., October 17, 1910, for performing the work and furnishing the materials in the construction of a District Sewer with all necessary laterals, inlets, catchbasins, manholes and other appurtenances, within the following described sewer district, known as Sewer District No. 12, which comprises all that portion of the said City of Muskogee, embraced within and bounded by the following lines, to-wit:

"Beginning in the center line of South Ninth Street at a point fifty (50) feet south of the north line of West Kalamazoo Avenue.

"Thence westerly to and with the south line of West Kalamazoo Avenue to its intersection with the southwest line of the right-of-way of the St. Louis and San Francisco Railway;

"Thence westerly to the intersection of Dean Avenue with the northwest line of the right-of-way of the St. Louis and San Francisco Railway;

"Thence west with the center line of Dean Avenue to the center of South Junction Avenue;

"Thence north with the center line of South Junction Avenue to a point opposite the center line of Estelle Avenue;

"Thence west with the center line of Estelle Avenue to a point opposite the center of the north and south alley in Block ten (10), Garrett Heights;

"Thence north with the center line of said alley to the center of Tennyson Avenue;

"Thence west with the center line of Tennyson Avenue to a point opposite the center of the north and south alley in Block six, Garrett Heights;

"Thence north with the center line of said alley to the center of Carolyn Avenue;

"Thence west with the center line of Carolyn Avenue to the center of south Twenty-fourth Street;

"Thence north with the center line of south Twenty-fourth street (a portion of which street is also known as Nineteenth street) and north Twenty-fourth Street to a point opposite the center of the east and west alley in block seven (7) Findley Heights;

"Thence east with the center line of said alley and of the alley in Block six (6), Findley Heights, to the center of North Twenty-first street;

"Thence south with the center line of North Twenty-first Street to the center of Denison Street;

"Thence southeasterly with the center line of Denison Street to the center of north seventeenth Street;

"Thence southwesterly with the center line of North Seventeenth Street to the center of Broadway;

"Thence southeasterly with the center line of Broadway to the center of North Sixteenth Street;

"Thence southwesterly with the center line of North Sixteenth Street to the center of West Okmulgee Avenue;

"Thence southeasterly with the center line of West Okmulgee Avenue to the center of Fourteenth Street;

"Thence southwesterly with the center line of South Fourteenth Street to the center of Elgin Avenue;

"Thence southeasterly with the center line of Elgin Avenue to the center of South Thirteenth Street;

"Thence southwesterly with the center line of South Thirteenth Street to the center of Fremont Avenue;

"Thence southeasterly with the center line of Fremont Avenue to the center of South Twelfth Street;

"Thence southwesterly with the center line of South Twelfth Street to a point opposite the center of the alley in Block one hundred and eleven (111), original townsite;

"Thence southeasterly along the center line of said alley to the center of South Eleventh Street;

"Thence southwesterly along the center line of South Eleventh Street to the center of Indianapolis Avenue;

"Thence southeasterly with the center line of Indianapolis Avenue to its intersection with the east line of Dean's addition extended north;

"Thence south to and with the east line of

Dean's addition to the center of Jackson Avenue;

"Thence southeasterly with the center line of Jackson Avenue to the center of South Ninth Street;

"Thence southwesterly with the center line of South Ninth Street to the place of beginning.

"The above sewer will be constructed of brick, concrete, vitrified brick and vitrified tile pipe in accordance with the plans and specifications adopted by the Mayor and Council and now on file in the office of the City Engineer from whom same may be obtained.

"Bids will be made on forms furnished by the City and for the larger sections, prices on brick, class 'A' and class 'C' concrete must be given. Bids will be compared on brick and class 'A' concrete. Class 'C' concrete may be used at the discretion of the Engineer and paid for at the price bid.

"Each bidder must deposit with his bid an unconditioned check for $5,000.00 payable to the order of the City of Muskogee, certified by some solvent responsible bank in the City of Muskogee, which check shall be forfeited to the City of Muskogee, unless the bidder, if awarded the contract, shall w i t h i n ten (10) days after such award, enter into a suitable contract with the City of Muskogee for the performance of the work and furnishing of the materials for which his bid was made and shall, within five (5) days after such contract is approved by the City, execute to said city a bond with surety satisfactory

to the Mayor and Council in the sum of approximately 25 per cent of the estimated cost of said district sewer conditioned for the protection of the city and all property owners interested, against any loss or damage by negligent execution of the work, and for the faithful execution thereof.

"Any conditions attached to the check so deposited will render the bid informal and liable to rejection.

"The bids will be opened by the Mayor and Council in the Council Chamber at the City Hall, at 8:00 o'clock p. m., on the 17th day of October, 1910, and the contract will be awarded to the lowest and best bidder. The right is reserved to reject any and all bids and advertise for other bids when none are, in the judgment of the Mayor and Council, satisfactory.

CHAS. WHEELER, JR., *City Clerk.*

"That neither the above notice to contractors for bids on said work, nor in the ordinance creating said district, nor in any other proceedings, advertisement or notice were the plaintiffs given an opportunity to appear and protest against said proceedings nor given any opportunity whatever of a hearing or expression of any sort from these plaintiffs in opposition or defense, or as to any corrections or objections whatsoever, but that notwithstanding that these plaintiffs had no such opportunity on the 24th day of October, 1910, said Mayor and Council entered into a contract in writing with said E. P. McCormick for the construction of a sewer within

the above described alleged storm sewer district of the following dimensions, to-wit: a diameter of five (5) feet at the lower extremity thereon, and fifteen (15) inches at the upper end thereof, which said storm sewer follows the natural watercourse of said portion of said city, and is a public storm sewer therein; and to create and construct several lateral storm sewers in said alleged district.

"The plaintiffs show further that under the direction of the Mayor and Council and other employees of the said City, the said F. M. McCormick has constructed a public or main trunk line sewer and said lateral sewers.

"Plaintiffs further show that the City of Muskogee by its officers, the Mayor and Council, have contracted and agreed with the said F. P. McCormick to pay for the construction of said sewers and laterals by the levying of a special assessment on all the property included within the alleged district aforesaid, within which the property of these plaintiffs is included, and that said City and said Franklin Miller, J. W. Boen, James King, Joe McCusker and W. N. Patterson, as City Commissioners, on Dec. 3rd, 1915, by a legal vote, passed and adopted Ordinance No. 999, entitled 'An Ordinance levying and assessing a special tax against each lot or parcel of ground in Sewer District No. 12, in the City of Muskogee, Oklahoma, to pay the costs of improvement in said district,' which ordinance attempted and purported to assess and levy against all the property within the above described dis-

trict, the sum of $56,607.67, being the cost of the construction of said sewer.

"And prior to the passage of said ordinance or before it was to go into effect, or at any time either before or after the passage of the same levying such assessment against the property of these plaintiffs they had no opportunity to appear and protest against the same or to object thereto, or to offer any suggestions or corrections in the said assessments to the end that the burden of the same might be distributed according to benefits, or that the said property should be assessed according to any other rule or standard whatsoever but that said ordinance making such assessment was passed arbitrarily and without these plaintiffs having an opportunity to protest or object to the same as aforesaid or to see that numerous corrections were made as to erroneous assessments and otherwise to be heard upon the merits thereof.

"That therein and thereby, the said Commission assessed against the property of the plaintiffs respectively, the sums of money hereinafter set forth, appearing opposite the lots owned by them in said district as follows:

Name.	Lot and Block.	Addition.	Amount.
P. L. Snyder,	lot 1, block 12,	Alta Vista Add.	$ 51.32
Bessie Rowsey,	W 50 feet lot 2, and E 50 feet lot 3, block 2,	Highland Add.	98.57
H. K. Farmer,	lots 1, 2, 3, 4, 5 and 6, block 10,	Alta Vista Add.	307.92
John T. Moore,	E half lot 6, block 12,	Highland Add.	50.40
John T. Moore,	lot 3, block 6,	Highland Add.	100.00
L. W. Pitts,	lot 7, block 146,	City	51.32
J. J. Pool,	N 60 feet of lots 10, 11 and 12, block 120	City	66.00
J. T. Lysle,	lot 1, block 145,	City	51.32
Mr. Finley,	lot 5, block 10,	Findley Add.	51.32

Name.	Lot and Block.	Addition.	Amount.
B. E. Spivey,	lots 5 and 6,	block 6, Alta Vista Add.	102.64
B. E. Spivey,	lots 7 and 8,	block 4, Alta Vista Add.	102.64
Ella Smith,	W half of N half	lot 2, block 178, City	56.28
Anderson Stewart,	lot 15,	block 1, Alta Vista	51.32
Franklin Garland,	lot 2,	block 201, City	102.64
Robt. Asquith,	lot 9,	block 2, Alta Vista	51.32
S. E. Coleman,	lots 3 and 4,	block 1, Alta Vista	102.64
Lucy Hassell,	lot 4,	block 7, Alta Vista	51.32
Mary Pitts,	lot 4,	block 198, City	102.64
Susie H. Sharp,	lot 4,	block 200, City	48.89
C. B. Bryant,	N half lot 3,	block 200, City	51.32
A. R. Fair,	lot 11,	block 8, Higgins	54.99
W. C. Fair,	lot 14,	block 8, Higgins	54.99
R. D. Fair,	lot 13,	block 8, Higgins	54.99
Geo. Smith,	S 46 2-3 feet, lot 6,	block 123, City	16.51
David Russell,	S 46 2-3 feet, lot 6,	block 136, City	17.11
Geo. Wood,	lot 7,	block 3, Deans Add.	82.48
W. S. Dills,	lot 6,	block 10, Alta Vista	51.32
W. L. Hoffman,	lots 1 and 2,	block 11, Alta Vista	102.64
S. F. Stevens,	lots 15 and 16,	block 7, Alta Vista	102.64
J. C. Welch,	E 108 feet,	block 173, City	158.35
Janet Langenberg,	E half lot 6,	block 2, Highland Add.	49.49
O. E. Swan,	E half lot 2,	block 5, Highland Add.	50.40
Isiah Davis,	lot 5,	block 3, Deans Add.	50.26
F. Simpson,	lot 12,	block 144, City	37.98
C. F. Meadors,	lot 4,	block 201, City	102.64
J. L. Haner,	S half lot 10 and S half lot 12,	block 108, City	51.32
P. A. Gavin,	N 50 feet lot 6,	block 198, City	51.32
H. W. Ely,	lot 12,	block 8, Higgins Add	54.99
W. A. Wilson,	lot 8,	block 5, Alta Vista Add.	51.32
John W. Brown,	lot 13,	block 7, Garrett Heights	48.39
Grant Brown,	lot 14,	block 7, Garrett Heights	48.39
W. D. Brewer,	lot 4,	block 8, Alta Vista	51.32
Wm. Ragsdale,	lot 2,	block 2, Deans Add.	95.31
J. L. Huff,	lots 6 and 7,	block 4, Garrett Heights	96.78
Edith H. Brainard,	lot 10,	block 8, Alta Vista	51.32
Emma Wieland,	lots 3 and 4,	block 10, Findley Heights	102.64
Mrs. P. L. Burlingame,	lot 2,	block 12, Alta Vista	51.32
Henry Stebbins,	lots 3 and 4,	block 1, Highland	197.94
W. B. Pearson,	lots 1, 14, 16,	block 11, Higgins	164.97
W. B. Pearson,	lots 4 and 12,	block 12, Higgins	109.98
W. B. Pearson,	lot 1,	block 14, Higgins	88.85
Ida Grant,	lot 6,	block 136, City	17.11
Mrs. Elizabeth Cook,	lot 11,	block 7, Alta Vista	51.32
C. F. Bullard,	lot 14,	block 1, Alta Vista	51.32
H. P. Sager,	lot 10,	block 7, Alta Vista	51.32
J. H. Meton,	lots 13, 14, 15, 16,	block 7, Findley Add.	233.60
J. H. Meton,	lots 11 and 12,	block 6, Findley Add.	111.80
J. H. Meton,	lot 5,	block 8, Findley Add.	51.32
Dr. C. A. Thompson,	lot 9,	block 7, Alta Vista	51.32

Name.	Lot and Block.	Addition.	Amount.
W. B. Pearson, lots 2, 13, 14, block 4, Garrett Heights			136.35
J. B. Parks, lots 2, 4, 6, 8, block 198, City			205.28
S. H. M. Young, lot 7, block 1, Higgins Add.			54.99
J. A. Bell, lot 2, block 137, City			3.52
Margaret Nagle, lot 16, block 6, Alta Vista			33.00
Dr. Ben H. Brown, S half of lot 7, block 198, City			51.32
W. H. Kremer, lot 12, block 7, Higgins			54.99
W. C. Garrett, lot 12, block 9, Alta Vista			[illegible]
L. S. Copeland, lot 1, block 6, Garrett Heights			48.39
W. H. Rairdon, lot 7, block 9, Garrett Heights			48.39
Susan Chadbourn, lot 2, block 8, Garrett Heights			51.14
L. E. Tomm, lot 9, block 7, Garrett Heights			48.39
J. L. Havis, trustee, lots 9, 10 and 11, block 7, Higgins			154.97
J. L. Havis, trustee, lots 15 and 16, block 8, Higgins			109.98
T. T. Gaddy, 1-No. 100 feet, block 148, City			36.66
J. F. Lawrence, W 65 feet, lot 7, block 3, Highlands			98.97
C. Pridgeon, lot 15, block 6, Findley			55.90
Edith H. Brainard, lot 10, block 8, Alta Vista			51.32
Dora H. Moorer, lot 10, block 1, Alta Vista			51.32
M. M. Lane, lot 5, block 5, Alta Vista			51.32
Chas. L. Reed, lot 13, block 8, Alta Vista			51.32
G. L. Chapman, E half lot 5, block 5, Highland			50.40
Lon Robinson, lot 1, block 6, Higgins			54.99
H. C. Montague, lot 17, block 6, Findley Add.			55.90
Mr. Doty, lot 6, block 1, Garrett Heights			48.39
E. Page, lot 3, block 7, Deans Add.			45.24
C. H. Finnigan, lot 8, block 120, City			51.32
Muskogee Nat. Bnk. lots 7 and 8, block 6, Higgins			109.32
Muskogee Nat. Bnk. lots 7 and 8, block 1, Alta Vista			102.64
C. N. Collins, lots 1 and 2, block 178, City			111.90
C. M. Collins, W half lot 4, block 6, Highland			50.40
R. S. Marshall, lots 9, 10 and 11, block 5, Higgins			164.97
C. M. Fullenwelder, 3 and 10 feet of lot 4, block 3, Highland			84.13
Bent Cobb, blocks 134-133, City			190.63
J. B. Fue, lot 1, block 1, Deans			17.42
J. W. Morton, lots 3 and 4, block 2, Deans			114.54
Reuben Mayo, lot 12, block 138, City			51.32
Lida B. Robe, lots 5 and 6, block 2, Higgins			109.98
J. M. Brucker, lot 1, block 145, City			51.32
C. E. Burford, lot 14, block 5, Higgins			54.99
H. H. Atkins, lot 4, block 5, Highland			100.80
Henry Stebbins, lots 7 and 8, block 2, Highland			197.94
Sady M. Lovell, W half lot 2, block 3, Highland			49.48
L. F. Flamm, lot 10, block 148, City			51.32
Una H. Tevis, S half lot 7, block 198, City			51.32
J. M. Stout, all of block 134, City			94.95
C. J. Eddy, lot 2, block 144, City			48.10
Muskogee Nat. Bnk., lot 2, block 9, Findley			51.32
Ben Hall, lot 5, block 9, Findley			51.32
Muskogee Nat. Bnk. lot 5, block 1, Deans			56.45
H. L. Jolly, lots 7 and 8, block 7, Garrett Heights			72.59

Name.	Lot and Block.	Addition.	Amount.
H. L. Jolly,	lots 1 and 2,	block 110, Garrett Heights	96.78
W. A. Hancock,	N half lot 3,	block 178, City	113.02
W. A. Hancock,	lots 3 and 7,	block 198, City	249.26
W. A. Hancock,	lot 4,	block 12, Alta Vista	51.32
O. F. Beebe,	lot 13,	block 7, Higgins	54.99
Grant Foreman,	lots 1, 7 and 8,	block 6, Highland	293.02
Mrs. Pulliam,	lots 4, 5, 6, 7 and 8,	block 7, Higgins	219.52
W. S. Bullard,	E half lot 6,	block 6, Highland	50.4[illegible]
Ophelia King,	W half lot 6,	block 6, Highland	50.4
L. P. Bullard,	lot 5,	block 6, Highland	100.8[illegible]
Ophelia King,	lot 13,	block 5, Higgins	54.99
John F. Smith,	lot 7,	block 8, Alta Vista	51.32
Fred J. Wilkemeyer,	lot 7,	block 5, Alta Vista	51.32
J. T. Nichols,	lot 9,	block 148, City	51.32
H. W. Gibson,	lots 5 and 6,	block 1, Highland	197.94
U. L. Jackson,	lots 11 and 12,	block 7, Garrett Heights	96.78
U. L. Jackson,	lots 11, 12 and 13,	block 6, Higgins	164.97
Wood Hurt,	lot 1,	block 201, City	102.64
Guy Morrison,	N 47 feet,	block 6, Alta Vista	17.25
H. H. Carter,	W 50 feet, S half lot 3,	block 178, City	56.51
E. W. Smart,	lots 1 and 8,	block 5, Highland Add.	109.98
A. F. Hubert,	E half of lot 3,	block 2, Highland Add.	49.49
J. M. McEntee,	lot 19,	block 7, Findley	5[illegible].90
J. M. McEntee,	lot 5,	block 8, Alta Vista	51.32
J. M. McEntee,	lot 8,	block 8, Alta Vista	51.32
W. R. Emerson,	lot 9,	block 6, Alta Vista	51.32
Muskogee Gas & Elec. Co.,	lot 8,	block 3, Alta Vista	51.32
American Nat. Bnk.,	lots 10, 11, 12, 13, 14, 15,	block 2, Alta Vista	307.92
Muskogee Nat. Bnk.,	lots 11, 12, 13, 14, 15, 16,	block 1, Higgins Add.	329.94
Muskogee Nat. Bnk.,	lots 2, 3, 4, 5,	block 6, Higgins Add.	219.96
Presilla Mackey,	lot 20,	block 6, Findley Heights	55.90
W. J. Quarles,	lots 1, 2 and S half lot 3,	block 7, Higgins Add.	137.47
A. H. Sharum,	lot 10,	block 141, City	2.57
A. H. Sharum,	lots 1, 2, 5 and 6,	block 130, City	134.64
A. H. Sharum,	lots 1, 2, 3, 4, 5, and 10, 11, 12,	block 123, City	410.56
A. H. Sharum,	lots 1 to 12, inclusive,	block 121, City	615.84
A. H. Sharum,	lots 7, 8, 9, 10, 11, 12,	block 110, City	307.92
A. H. Sharum,	lots 2, 3, 4, 5, 6, 10, 11, 12,	block 109, City	410.56
Midland Valley R. R. Co.,	that part of the district occupied by the Midland Valley Railroad right-of-way, 182,000 square feet		1,334.19
D. H. Linebaugh,	lot 3,	block 3, Alta Vista	51.32
W. L. Biggs,	lot 1,	block 3, Highland Add.	98.97
F. E. Coss,	lot 6,	block 3, Highland Add.	98.97
J. M. Miller,	lot 10,	block 3, Alta Vista	51.32
J. M. Miller,	lot 4,	block 5, Alta Vista	51.32
J. M. Mills,	lot 4,	block 6, Alta Vista	51.32

Name.	Lot and Block.	Addition.	Amount.
Chas. Nelson,	lots 1 and 2, block 2,	Alta Vista	102.64
M. L. Gerton,	lot 6, block 147		27.42
C. T. West,	lot 8, block 175		51.32
W. P. Field,	40 feet lot 6, block 201		29.33
W. P. Field,	50 feet lot 6, block 201		43.99
C. A. Lockard,	lots 3 and 4, block 201		205.28
Washington Loan & Trust Company,	lot 6, block 198		102.64

"The plaintiffs further show that Block 198 in the City of Muskogee, which is included in said sewer district, was platted by the government survey of said city into seven lots. That after, and before the creation of said sewer district, lots 1, 2 and 3 of said Block 198, were subdivided into lots 1, 2, 3, 4, 5, 6, 7, and 8, and two alleys were platted upon said sub-division, which alleys do not appear upon the original plat of said city.

"That the plaintiff, W. A. Hancock, became the owner of lots 1, 2, and 3 of Block 198, and has been the owner of said lots for more than a year past. That the assessing ordinance passed by the said Board of Commissioners on Dec. 3, 1915 has assessed all of the property in Block 198 for a part of the cost of said sewer, but has erroneously failed to assess the same against the lots within said block according to the legal subdivision, and numbers thereof, as platted and subdivided according to the official records of said city, platting and sub-dividing, now on file in the office of the County Clerk for Muskogee County and that by reason thereof, lot 3 owned by said plaintiff, W. A. Hancock, is not assessed by itself, but is included within the original lots 1 and 2 of said block, charges against which amount to the sum of $293.24, and thereby includes prop-

erty for which said plaintiff, Hancock, is not liable, and in which he has no interest; so that before said Hancock can discharge the lien on his property, according to said assessing ordinance, it will be necessary for him to pay the assessment on property many times the area of the property owned by him, and that said block was sub-divided before the pretended organization or creation of said sewer district.

"The plaintiffs show further that a sewer within said District No. 12, was contracted for, and constructed under a pretended authority contained in sections 985 to 993 inclusive, of Snyder's Compiled Laws of 1909, and Ordinance 613 of the City of Muskogee. That nowhere in said statutes or in said ordinance was provision made for hearing of objections or corrections by the property owners sought to be charged for the construction of said sewer, and thereby the plaintiff, W. A. Hancock, nor his grantors were afforded no opportunity, time or place to appear before the Commission of the City of Muskogee and object to having his property assessed with other property, in an amount greatly in excess of a proper charge against the property owned by him.

"The plaintiffs show that the statutes under which said sewer district was created and the assessing ordinance passed by the City of Muskogee, as well as Ordinance No. 613 and Ordinance No. 999 passed December 3, 1915, assessing the cost of said sewer district against the property within said District No. 12 are all unconstitutional and void for the reason that at no

place therein either as provided by the statutes of the state or the ordinance of the City of Muskogee, Oklahoma, was these plaintiffs, or are they at this time afforded an opportunity to protest or object to the said proceedings or any part thereof, nor to have the same corrected or adjusted, nor to have any hearing in regard or relation thereto whatsoever; nor at no time during the course of said proceedings did these plaintiffs have any notice or knowledge thereof, nor does the law nor said ordinance provide for any notice of any kind or character to these plaintiffs or others interested in said sewer district. And that said statutes of this state, as aforesaid, and ordinances of said city are in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States in that the proceedings had by said city and pretended to be authorized by said statutes and ordinances constitute and result in the taking of the property of these plaintiffs without due process of law and that the proceedings of said defendant under said statutes and ordinances deny as to these plaintiffs the equal protection of the law in that the inhabitants of the defendant city living in other sewer districts receive the benefits of the general bonds voted by said defendant, as hereinafter described, and that these plaintiffs, although being compelled to pay taxes to liquidate said bond indebtedness which was created for the building of storm sewers, is, notwithstanding, required to pay for the sewer in said district by special assessment therefor; and these plaintiffs claim a right, privilege and immunity under the

Fourteenth Amendment to the Constitution of the United States in that the said statutes and ordinances and proceedings deprive them of their property without due process of law and denies to them the equal protection of the law and ask this court to adjudicate and pass upon their rights under said provisions of the Constitution of the United States as aforesaid.

"The plaintiffs show that under said pretended authority, and without notice or opportunity to be heard in opposition thereto, the defendants, the City of Muskogee, the Commissioners and City Clerk, entered into a contract with one F. P. McCormick for the construction of said sewer, and promised therein and thereby, to pay the said F. P. McCormick, by assessing the cost of said sewer against the property within the district, and by a special assessment to collect from these plaintiffs, the amounts heretofore set out herein opposite the lots owned by them, and that said defendants are now threatening to, and are about to execute and deliver to the said F. P. McCormick, certain negotiable bonds evidencing an assessment of the property above named, and rendering said property liable to pay for the use of the holders of said bonds, the amounts respectively appearing opposite their lots, hereinabove set forth, and that unless restrained, these defendants will execute and deliver said bonds and that said bonds when delivered will be negotiable by said McCormick to innocent purchasers for value.

"The plaintiffs show further that their property has been listed with the proper officials for

taxation, and has been taxed and is now taxed for the purpose of paying all the burden of taxable real estate of the City of Muskogee, including certain taxes to be placed in the sinking fund of the City of Muskogee for the purpose of redeeming bonds voted by the whole City of Muskogee for the construction of public storm sewers in said city, one of which sewers, now completed, is embraced in a district smaller than the district herein and that no property in the City of Muskogee other than that included in the district aforementioned has been taxed or threatened to be taxed to pay for said storm sewer in said District No. 12. And if said property within said alleged storm sewer district No. 12 including said property of plaintiffs, shall be made liable for said special assessment, there will be imposed upon it not only the burden of contributing its share towards the construction of other storm sewers in the City of Muskogee, but it will carry the additional burden of paying for a public sewer, which burden is not shared by property in said city outside of said district No. 12.

"The plaintiffs show further that on October 15, 1908, there was held in the City of Muskogee by legal authority an election on the proposed issue of $300.000 of bonds by said city, for the purpose, as stated in the call for said election, 'to construct additional trunk line storm sewers and public sanitary sewers and outlets for the proper drainage of said city.'

"That at said election the proposed bond issue was carried by a legal vote and said bonds were afterward issued and became a lien on all

the real estate in the City of Muskogee, including the property of the plaintiffs described herein. That said bonds were sold and realized the sum of $309,573.30, which was held by the city for the purpose which it was voted; and which sum was ample for the purpose of intersecting the City of Muskogee with trunk line storm sewers including the sewer in the property described herein, and for the construction of public sanitary sewers and outlets for the proper drainage of said city.

"That the Mayor and Council in behalf of the City of Muskogee entered into contracts for the construction of sewers as follows:

"Heman Construction Company, for the construction of storm sewer number one, for which the city had paid $71,542.16, on July 25, 1910.

"E. P. McCormick, for the construction of storm sewer number two, for which the city had paid $33,695.50, on May 31, 1910.

"E. P. McCormick, for the construction of storm sewer number three, for which the city had paid $72,395.55, on May 31, 1910.

"Heman Construction Company, for the construction of sanitary sewer number 10, for which the city had paid $30,371.56, on May 31, 1910.

"Heman Construction Company, for the construction of sanitary sewer number eleven, for which the city had paid $22,868.80, on May 31, 1910.

"All of which sums were paid out of the proceeds of said bond issue.

"That on September 12, 1910, the date on which the City Council created the sewer district herein complained of, there was a balance of said fund of $309,573.30, realized from said bond sale, belonging to said City of Muskogee, unexpended and not contracted for of more than $50,000.00.

"That on September 12, 1910, at a time the City of Muskogee was in possession of sufficient funds to build a storm sewer to drain the property herein described, which funds were realized by the sale of bonds which were then and now are a lien on said property, the City of Muskogee by its Mayor and Council, without notice to the plaintiffs and without their consent, illegally and unjustly discriminated against the plaintiffs by proposing to build a public storm sewer through said property and refusing to pay for the same or any part thereof with the funds then held by the City and realized for that purpose.

"Plaintiffs allege that when the work was being constructed and said sewers built that they were under the impression and believed that the same was being built by the defendant city out of the proceeds of the sale of the general bonds of said city issued for that purpose and did not know and did not stand by and see such improvements going in with the knowledge that they were to be assessed therefor, but understood at all times that the same were to be paid for out of the bond issue voted for such purpose as above alleged. And if they had of known or had any

notice or knowledge of the intention of the defendant herein to assess the value of said improvement to the property of these plaintiffs they would have protested and objected thereto during the time that such work was being conducted and that these plaintiffs did not know that a part of the funds voted by the city under the general bond issue, as above stated, had been diverted or squandered for other purposes and did not know that it was the intention to assess them for the value of this improvement until the work was entirely completed and when the defendant attempted to deliver to the contractor bonds therefor; nor had these plaintiffs had any notice of any kind or character either actual or constructive thereof.

"*Wherefore,* the plaintiffs pray this honorable court for a temporary injunction against the City of Muskogee and the said defendants, Franklin Miller, J. W. Boen, James King, Joe McCusker, W. N. Patterson and Charles Wheeler, Jr., and their successors in office, enjoining and restraining them from proceeding to execute and deliver to the said E. P. McCormick, or any other person any bond or evidence of indebtedness or liability against the property above described, or from collecting or attempting to collect such special assessment to pay charges hereinbefore set forth; or to pass or to consider officially any ordinance or resolution to that end, or from certifying such special assessment to the County Treasurer or to any other officer, upon the failure of the plaintiffs or any of them to pay the charges against their property, and extend

said injunction or restraining order against said defendants until the cost of the construction of said sewer shall have been taxed against all of the property in the City of Muskogee, so that the property of the plaintiffs described herein may be required to pay only its just share of such burden of taxation, and that on final hearing of said cause, said defendants be perpetually enjoined and restrained from enforcing the collection of said special assessment against the property of the plaintiffs hereinabove described, and that the plaintiffs have all other just and proper relief, and that the defendants be adjudged to pay the cost of this action."

This petition was duly verified.

Upon the filing of this petition a temporary restraining order was issued and served. (See Rec., p. 32.) The plaintiffs afterwards filed an application to bring in new parties which application was granted and new parties brought in. (See Rec., pp. 38, 39, 40 and 41.) Afterwards upon a hearing a temporary injunction was issued. The same appears upon pages 45 and 46 of the record and is as follows:

"The above entitled matter coming on for hearing this 9th day of March, 1916, pursuant to an order of this court heretofore made upon the application of the plaintiffs herein for a temporary injunction to restrain the said defendants from doing and performing all of the acts and things sought to be enjoined in the plaintiffs' petition filed herein, the plaintiffs appear by their

attorneys, Blakeney & Maxey and Grant Foreman, and the defendants, and each and all of them appear by their attorney Charles Bagg. And thereupon it is agreed by the parties by their respective attorneys that a temporary injunction may be granted as prayed in plaintiffs' petition and amendment thereto, pending the final determination of this suit.

"It is therefore by the court considered, ordered and adjudged that the defendants, the City of Muskogee, Franklin Miller, Mayor, J. W. Boen, James King, Joe McCusker and W. N. Patterson, Commissioners, and Charles Wheeler, Jr., City Clerk of said City of Muskogee, and their successors in office and each of them, are hereby temporarily enjoined pending the final hearing of this cause from proceeding to execute and deliver to F. P. McCormick, or anyone for him, or his assignee, or any other person acting under, by or through him, any bond or evidence of indebtedness, or either of them, located and situated in Sewer District No. 12, in the City of Muskogee, State of Oklahoma, as described in plaintiffs' petition. And the said defendants and their successors in office and each of them are temporarily enjoined during the pending of this suit, from collecting or attempting to collect the special assessment or assessments against the property of these plaintiffs in Sewer District No. 12, City of Muskogee, as alleged in plaintiffs' petition or to pass or consider any ordinance to that end and are also enjoined from certifying any special assessment of said property for the construction of a storm sewer in said

district to the County Treasurer or any other officer of this county, or from taking any other proceeding or action sought to be enjoined in the plaintiffs' petition.

"It is further considered, ordered and adjudged that the plaintiffs give an injunction bond conditioned as by law provided in the penal sum of Five Hundred Dollars to be approved by the Clerk of this court and upon filing and approval of said bond the said defendants and each of them and their successors in office are hereby temporarily enjoined as above recited without further service or other notice.

R. P. DEGRAFFENRIED, *District Judge.*"

An injunction bond was duly given as required by the order which bond was also duly approved. (See Rec., pp. 46, 47 and 48.)

The defendants filed a general demurrer to the plaintiffs' petition. (See Rec., pp. 55 and 56.) And the court upon a hearing sustained the demurrer, to which the plaintiffs excepted. The plaintiffs refused to plead further and elected to stand on their petition. And thereupon the court dismissed the same for want of equity and for the reason that it did not state facts sufficient to constitute a cause of action, and entered a judgment for defendants, to which the plaintiffs excepted. (See Rec., pp. 56 and 57.)

The plaintiffs thereupon prosecuted an appeal to the Supreme Court of the State of Oklahoma, and

on July 24, 1917, the Supreme Court of said state affirmed the judgment of the lower court, and delivered a written opinion thereon. (See Rec., pp. 62, 63, 64, 65, 66.) The plaintiffs thereupon filed a petition for rehearing, which petition appears on pages 67 to 71 inclusive of the record, and thereafter said petition for rehearing was denied. (See Rec., p. 72.) The Supreme Court of Oklahoma held that the statutes of the state and proceedings had thereunder did not deny to the plaintiffs the equal protection of the laws of the state, nor did it take or deprive the plaintiffs of their property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. The plaintiffs thereupon filed a petition for a writ of error which petition appears on pages 2, 3 and 4 of the record; and also at the same time filed an assignment of errors which appears on pages 4, 5, 6 and 7 of the record. The writ of error was duly allowed by the Supreme Court of the State of Oklahoma (see Rec., p. 8), and was duly issued as provided by law. (See Rec., pp. 10 and 11.) *Supersedeas* bond was filed and approved as required by law, and by the order allowing the writ of error. (See Rec., pp. 11, 12 and 13.)

SPECIFICATION *of* ERRORS.

The plaintiffs filed an assignment of errors which contains ten specific assignments and is set out in full on pages 5, 6, and 7 of the record, but they all present under different forms one proposition, which we will discuss, to-wit:

The court erred in holding that the statutes and laws of the State of Oklahoma providing for the manner of giving notice to property owners as to proposed sewer improvement and the letting of contracts therefor and assessments of benefits to said property owners constituted as to such property owners due process of law within and as provided by the Fourteenth Amendment to the Constitution of the United States; and erred in holding that the proceedings as shown by the plaintiffs' petition and amendments thereto were not contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law nor shall any state deny to any person within its jurisdiction the equal protection of the law.

We will discuss this assignment under two subdivisions, to-wit:

A.

Under the statutes of the State of Oklahoma as they existed at the time that these proceedings were had, a property owner at some stage of the proceeding must have notice and an opportunity to be heard before his property can be taken.

B.

The Statutes of Oklahoma as they existed at the time did not provide for such notice as would constitute due process of law, nor was notice, such as would constitute such process, given to the plaintiffs in this case.

ARGUMENT.

A.

Under the statutes of the State of Oklahoma as they existed at the time that these proceedings were had, a property owner at some stage of the proceedings must have notice and an opportunity to be heard before his property can be taken.

The Statutes of the State of Oklahoma authorizing the construction of sewers at the time this sewer was authorized is found in Article 16 of Snyder's Compiled Laws of 1909, beginning on page 385, and included within Sections 984 to 993, and are in words and figures as follows:

> "*Sec. 984.* That in municipal corporations having a bona fide population of not less than one thousand persons, the mayor and councilmen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to-wit, public, district and private sewers.
>
> "*Sec. 985.* Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance and these may be extensions or branches of sewers already constructed or entirely new throughout, as may be deemed expedient.

"*Sec. 986.* District sewers shall be established within the limits of the districts, to be prescribed by ordinance, and shall connect with public sewers or other district sewers, or with the natural course of drainage, as each case may be. Such districts may be subdivided, enlarged or changed by ordinance at any time previous to the construction of the sewer therein; and more than one district sewer may be laid in a sewer district if deemed necessary by the council for sanitary or other purposes. The council shall cause sewers to be constructed in each district whenever a majority of the property holders, residents therein shall petition therefor, and said sewers shall be of such dimensions and materials as may be prescribed by ordinance, and may be changed, enlarged or extended, and shall have all the necessary laterals, inlets, catch-basins, manholes and other appurtenances: *Provided,* however, that the property owners shall have the right to construct the lateral sewers abutting their own property under the directions and supervision of the city engineer and at such time as the city engineer may prescribe. The cost of such district sewers shall be assessed and collected as hereinafter provided; but the city shall incur no liability for building district sewers, except when the city is the owner of a lot within the district, and in that case the city shall be liable for the costs of said sewer in the same manner as other property owners within the district.

"*Sec. 987.* Private sewers connected with the public and district sewers may be constructed under such restrictions and regulations as the

mayor and councilmen may prescribe by general ordinance; but the city shall be at no expense in the construction, repairing, or cleaning of the same. *Provided,* however, that the owner of any lot abutting any district sewer may, at his option, construct the said sewer along his lot, which shall be constructed at the same time and in conformity to the balance of said sewer.

"*Sec. 988.* No sewer shall be run diagonally through private property when it is practicable, without injury to such sewer, to construct it parallel with one of the exterior lines of such property; nor shall any public sewer be constructed through private property when it is as practicable to construct it along or through a street or other public highway. The council shall have the power to condemn private property for public use, occupation or possession in the construction and repair of public and district and private sewers in the same manner as other property is condemned within the city for public uses.

"*Sec. 989.* Whenever the mayor and councilmen shall deem such district sewers necessary, as provided for in section three of this Act (986) they may proceed with such work and shall cause to be prepared sections, profiles, and specifications for the work, together with the complete estimate of the costs. And the mayor and councilmen shall have the power to adopt any material or methods for the construction of such sewers and to have such plans prepared in accordance with its directions as to the kind of material used. Upon the completion of the plans

and specifications and their adoption by the mayor and councilmen, they shall advertise for sealed bids for the performance of such work, for at least ten days if published in a daily newspaper, or at least two weeks if published in a weekly newspaper which paper shall be of general circulation in the city, and which notice may contain any reasonable conditions to be imposed by the mayor and councilmen with reference to the letting of such contract, and may require the giving of a good and sufficient bond for the faithful execution of the work, and for the protection of the city, and all property owners against any loss or damage by the negligent execution of such work. At the time and place specified in the notice, the mayor and councilmen shall award the contract to the lowest responsible bidder for the work, which contract shall in no case exceed the estimate of costs submitted with the plans and specifications and shall be subject to the right of the mayor and councilmen to reject any and all bids and to re-advertise for other bids when none of the same are, in their judgment, satisfactory. *Provided,* that where a majority of the property owners in any block, petition the mayor and councilmen for a lateral sewer through or in such block, the advertising for bids shall not be necessary, but the mayor and councilmen may cause such improvement to be made without such notice.

"*Sec. 990.* As soon as any district sewer shall have been completed, the city engineer or other officer having charge of the work shall compute the whole cost thereof, which shall also

include all other expenses incurred by the city in addition to the contract price of the work, and shall apportion the same against all the lots or pieces of ground in such district exclusive of improvements, in proportion to the area of the whole district, exclusive of the public highways, and such officer shall report the same to the mayor and councilmen, and the mayor and councilmen shall thereupon levy and assess a special tax, by ordinance against each lot or piece of ground within the district, which ordinance shall be published in some newspaper of general circulation in the city for four consecutive weeks, and if at the expiration of such time the amount named in such ordinance together with the cost of publication shall not be paid, then the mayor and councilmen shall cause tax warrants to be issued against such lots and pieces of ground in said district, which tax warrant shall recite the date of the passage of the ordinance making the assessments, the amount of the assessment, the description of the property against which the same is levied, and that the same will be levied against said property in three equal installments with interest thereon at the rate of eight per cent per annum, levied each year, to become due on the fifteenth day of December next after each such levy, to pay the maturing installments and shall be signed by the mayor, and countersigned by the city clerk, which said tax warrants shall be delivered to the contractor; *provided,* that the aggregate amount of such warrants to be delivered to the contractor shall not exceed his contract price, and the city

shall hold and retain for its own indemnity a sufficient amount of the same to cover other expenses than the contract price of executing the work.

"*Sec. 991.* The mayor and councilmen shall each year levy on each lot or piece of ground, a sufficient sum in addition to the other taxes, to discharge the maturing installment on each particular tract, with interest on the unpaid installment for such year, certify the same to the county clerk to be collected as other taxes, and which money, when collected by the county treasurer, shall be paid to the holder of such certificate and endorsed thereon upon presentation of the certificate: *Provided,* that the owner of any lot or piece of ground may redeem his property from such special assessment at any time by paying the amount of unpaid installments, to the county treasurer and the interest thereon until the maturity of the next succeeding installment, and upon presentation of the certificate against such property, the county treasurer shall pay the same in full and cancel the same and hold for delivery to the person making such redemption. The said assessment shall be a charge and lien against the property upon which assessed until fully discharged, but unmatured installments shall not be deemed to be within the terms of any general covenant or warranty.

"*Sec. 992.* No suit shall be sustained to set aside any assessment or certificate issued in pursuance of any assessment or to enjoin the city council from making any improvement, unless brought within sixty days after the passage of

the ordinance making such assessment. *Provided*, that in the event any special assessment shall be set aside or be invalid in whole or part, the city council may, at any time, in the manner herein provided for an original assessment, proceed to c a u s e a new assessment to be made, which shall have the like force and effect as an original assessment.

"*Sec. 993.* Any proceedings to build lateral sewers pending at the time of the passage of this Act, shall not be affected by its passage as to any step previously taken, but all proceedings subsequent to the passage of this act shall conform to the provisions hereof."

From first to last of this legislation there is no word directing that notice of the proposed creation of a district sewer shall be published or served upon any one and no provision whatever is made for hearing or entertaining a protest or expression of any sort from the property owner concerning his wishes or any showing to be made by him for the purpose of pointing out errors in the proposed plans or methods of building a sewer or of improperly conceived theories of benefits to property affected. And absolutely no provision is to be found requiring or authorizing or even countenancing the changing of any plan or undertaking by the mayor or councilmen in view of any showing that might be made to them by the property owners.

The only expression contained in all this legislation indicating that the property owner may be heard in any way to express his desires is that in Section 986, wherein it is provided that the council shall cause sewers to be constructed in any district whenever a majority of the property owners, residents therein, shall petition therefor.

If every property owner in the district had been opposed to the construction of the sewer, he was without a forum in which to be heard and without legislative warrant of law to make his protest of any avail.

Now our point is not that a property owner must in every case have notice of the initial ordinance or that he must necessarily have notice and an opportunity to be heard on the question of the amount of the assessment on his property. We admit that perhaps in one case the first hearing to which he is entitled might be at the time of the determination of the amount of the assessment. We admit that in another case where the calculation of that amount is merely mathematical and involves no discretion nor any judicial determination, no notice or hearing on that point is essential. *But our contention is that, in all cases, if not on one point, then on another, there must at some stage of the proceedings, be notice and an opportunity to be heard in opposition or defense, to make a showing that his*

property is erroneously and improperly included in the district, or cannot be benefited by the sewer, or to set up any other substantial objection before his property can be taken, in order to constitute due process of law.

These questions have been p r e s e n t e d to this court and decided by it so often that we feel it is unnecessary to make any extended argument or citation of authorities in support of our position. As we gather from the decisions of this court the rule to be applied is as follows:

If the legislature fixes by law the area or specific property which is to be assessed, and also fixes the amount of the assessment so that nothing remains to be done but to mathematically compute the result, then no notice is necessary to the property owner in order to constitute due process of law, but if upon the contrary the legislature fails to fix the area or specific property to be assessed, or if it fixes the area but fails to fix the amount of the assessment so that nothing remains to be done but to mathematically compute the result, notice at some stage of the proceedings and an opportunity to be heard is necessary in order to constitute due process of law.

It will be noticed that the Statutes of Oklahoma provided the method of assessment so that nothing remains to be done but to mathematically compute

the result, *but the statutes of the state do not fix the area or the property to be assessed, but leaves this to the discretion of the local authorities.*

The Supreme Court of the State of Oklahoma in deciding this case against the plaintiffs in error proceeded upon the theory that if the legislature fixed the amount, no notice was necessary even though it did not fix the area or property to be assessed, but left this to the discretion and judgment of the local authorities. In this we submit that the Supreme Court of the state misconstrued and misapplied the rule as often announced by this court to the effect that *the legislature must fix by law both the area to be assessed and the amount of the assessment if it intends to dispense with all notice to the property owner.*

—*French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324;

Spencer v. *Merchant*, 125 U. S. 345;

Parsons v. *District of Columbia*, 170 U. S. 52;

Falbrook Irrigation District v. *Bradley*, 164 U. S. 112;

Paulsen v. *Portland*, 149 U. S. 30;

Wagner v. *Leser*, 239 U. S. 607.

The decisions of this court involving the questions here presented were reviewed at length and fully discussed in a very able opinion delivered by

Mr. Justice SHIRAS in the case of *French* v. *Barber Asphalt Paving Company, supra.* The court reached a conclusion in this case that the plaintiff's property was not taken contrary to due process for the reason that they found that the legislature had by law fixed the area to be assessed and the amount of the assessment, but expressly recognized the doctrine for which we contend that if either of the propositions above stated is left to official boards or municipal authorities, notice and an opportunity to be heard is necessary to constitute due process of law. In the case of *Spencer* v. *Merchant, supra,* Mr. Justice GRAY delivering the opinion of the court uses the following language:

> "When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question w h e t h e r their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

So in the case of *Fallbrook Irrigation Company* v. *Bradley, supra,* where the legislature had fixed both the area and the amount, Mr. Justice PECKHAM delivering the opinion of this court expressly states that when these questions, or either of them, is left to the local authorities, that notice at some stage of the proceedings and an opportunity to be heard is necessary. In discussing the propositions he uses the following language:

> "But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer* v. *Merchants,* 125 U. S. 345, 356 (31: 763, 767), and *Walston* v. *Nevin,* 128 U. S. 578 (32: 544)."

In the case of *Brook* v. *City of Oakland,* 117 Pac. 433, the Supreme Court of California had occasion to construe and to pass upon the constitutionality of certain statutes of that state relating to the build-

ing of a district sewer. The statutes under consideration by the court were very similar to the statutes of this state which are under consideration here. The court in that case reviewed many decisions of this court involving this question, and after reaching the conclusion that the legislature had power to fix by statute the boundaries of a local taxing district, and the amount to be borne or paid by the property in said district without a notice or hearing, concluded however, that where the legislature does not fix these matters but delegates the same to the city council that at some stage of the proceedings the land owner is entitled to notice and opportunity to be heard. Upon this the court says:

> "Upon the converse question of the right to and the necessity for a hearing where the legislature does not itself fix the bounds of the assessment district, but commits such determination to some local tribunal, the city council in this case, the decisions of that court are equally decisive to the effect that at some stage in the proceedings the landowner must be accorded a hearing upon the question whether or not his land is benefited by the proposed public improvement, in order to constitute due process of law. In the *Fallbrook* case the court, after the passage above quoted, proceeded to d i s c u s s this phase of the question, saying: 'But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what

lands described in the petition shall be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the land-owner has the right to be heard upon that question before his property can be taken.' In *Spencer* v. *Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, the legislature had declared in the act that certain lands were benefited and should be taxed for the improvement. The court held this determination conclusive upon the courts, but added that, if the determination is committed to commissioners, the landowners 'may be entitled to notice and hearing upon the question whether their lands are benefited and how much.' In *Parsons* v. *District of Columbia*, 170 U. S. 52, 18 Sup. Ct. 524, 42 L. ed. 943, the court said: 'Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to a notice and an opportunity to be heard'."

It will be noticed that the statutes of the state as they existed at the time this district was attempted to be created and the work done thereunder, provide for the method of payment, in that each square foot

is to be assessed its equal share of the total cost, *but the property to be assessed and the property benefited thereby and to be included in the sewer district is left to the local authorities.* The city council could have taken in to the district whatever property they saw fit, without regard to whether it was benefited, or without regard to whether it was so located as to be practical for bringing it within said district, etc. This being a question left to the local authorities under the established rule of this court, the plaintiffs in error were entitled to notice and an opportunity to defend.

This case presents a striking example of the reasons why notice to property owners should be required and fully demonstrates the wisdom of the provisions of the Fourteenth Amendment to the Constitution of the United States which prohibits the taking of property without due process and prohibits the state from denying to any person within its jurisdiction the equal protection of its laws.

As alleged in the petition, sometime prior to the creation of this sewer district, to-wit: on October 15, 1908, there was held in the City of Muskogee, an election at which bonds in the sum of $300,000.00 were authorized for the purpose of building those sewers throughout the City of Muskogee. The election was duly carried and the bonds sold and

there was realized the sum of $309,573.30. That at about the time of the passage of the original ordinance creating sewer district No. 12 there was in the possession of the City of Muskogee out of this fund more than $50,000.00 which was sufficient to have constructed the sewer. That sewers had been constructed in other parts of the city out of this money but instead of the city authorities using the money voted by the entire city for this purpose to build and construct this sewer, they diverted the remainder of the fund to other purposes, organize sewer district No. 12, contract for the erection of a sewer therein to be assessed up to the property owners in that district, the outcome of which is, that the citizens owning property in sewer district No. 12 are required to pay their part or share of the general bond issue voted by the entire city for this purpose, and in addition thereto are required to pay for building their sewer when the other parts of the city received theirs out of the general bond issue. The mere statement of the facts as alleged in the petition in this case shows the manifest unfairness of this proceeding. It is also alleged in the petition that W. A. Hancock, one of the plaintiffs, was the owner of certain lots in the district which had been assessed with all the lots in that block; that is, the block had been assessed together. That he was unable to pay the taxes upon his lots unless he paid and discharged the taxes on

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The Statutes of Oklahoma as they existed at the time, did not provide for such notice, as would constitute due process of law, nor was notice, such as would constitute such process, given to the plaintiffs in this case.

In order to constitute due process of law there is at least two requisites:

1st. Notice of the time and place of hearing such as will apprise the party interested that he or his property is affected.

2nd. A tribunal which has authority under the law to hear and determine the questions involved.

It will be noticed that Sec. 986 of the statute quoted herein provides that district sewers may be established within limits to be prescribed by ordinance; and other sections of the statutes required all ordinances to be published.

Section 989 of the statute provides that the council of the city shall advertise for sealed bids for the construction of the sewer. Section 990 provides that the mayor and councilmen shall levy and assess a tax against the property by ordinance which shall be published in a newspaper for four weeks, and if at the expiration of this time the amount named as being assessed against each particular piece of prop-

erty is not paid, then tax warrants shall issue. In the case at bar it will be observed that the City of Muskogee did not create the sewer district by separate ordinances, and thereafter caused a sewer to be constructed, nor did a majority of the property owners resident therein petition for the same, but that in one ordinance, and without any petition from the property owners, they created a district providing for the construction of the sewer, and directed the city clerk to advertise for bids. Immediately after the passage of the ordinance the city clerk gave notice that bids would be received. Bids were received and the contract let, and thereafter an ordinance levying and assessing the special tax against the plaintiffs' property was passed. Nowhere in this statute is any notice to the property owner required; nor is there any time or place set for hearing a protest. While it is probably true that in order to constitute due process in this character of proceedings, the notice would not be required to be addressed specifically to the property owner, still there must be some notice which would call to his attention that at a certain time and place he would have an opportunity to object. As stated by this court in the case of *Grannis* v. *Ordean,* 234 U. S. 385, "The fundamental requisite of due process of law is the opportunity to be heard, and it is to this end, of course, that summons or notice is employed." It is necessary in order to

constitute due process that the statute provide for a hearing. This is well illustrated in case of *Lundoner* v. *City and County of Denver*, 210 U. S. 373, in which this court said:

> "In the assessment, apportionment, and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. (Citing authorities.) It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the b o a r d of equalization.
>
> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for

taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

We submit that nowhere in these statutes as they existed at the time of these proceedings any notice or opportunity to be heard was required or given. It is not enough that a taxpayer may have casual notice, or that a hearing may be granted him as a matter of favor, but the law itself must provide for notice. This proposition is very clearly stated by this court in the recent case of *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, where the court use the following language:

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart* v. *Palmer*, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hear-

ing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in *Security Trust & S. B. Co.* v. *Lexington,* 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice PECKHAM, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in *Central of Georgia R. Co.* v. *Wright,* 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In *Roller* v. *Holly,* 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louisville & N. R. Co.* v. *Central Stockyards Co.,* 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the p a r t i e s' rights, and not leave them to the discretion of the courts as such'."

The Supreme Court of this state held that the publication of the ordinance creating the sewer district and providing for the improvement, together

with the publication of notice to contractors, was a sufficient notice to the plaintiffs. We submit that this was no notice whatever to plaintiffs. The ordinance created the district and determined it was necessary to make the improvement. It was in no sense a notice to the property owner that the improvement was being considered, or that the City Council was considering advisability of creating a district, but by the passage of the ordinance the Council had already created a district, and determined that the improvements should be made before it was ever published. The publication was not addressed or directed in any way to these plaintiffs, *nor did it purport to advise them that at some time and place they might be heard thereon.* The notice to contractors that the City Council intended to receive bids for the work is of the same effect.

Nowhere in any of the notices, or in any of the provisions of the statute are the plaintiffs notified of provisions made for notice to them of any time or place of hearing. It therefore appears to us that the publication of the ordinance, and the notice to contractors as to receiving bids does not meet the requirements of due process of law to the extent that a notice to the persons affected of the time and place of hearing is necessary.

No Tribunal Before Whom Hearing Could Be Had.

Even though it could be said that the publication of the ordinance creating a district, and the notice to the contractors to submit bids, would be a sufficient notice to the plaintiffs of a time and place for hearing objections by them, still, under the law there is no tribunal competent, authorized, or designated for hearing such complaints. It will be observed from reading the statutes that no attempt is made to invest any board or other person with authority to hear a protest. The term "due process of law" not only requires a notice of the time and place, and an opportunity for hearing, but further requires that there must be a tribunal competent to pass upon the subject-matter of the case.

—Hamilton, Special Assessment, Sec. 147;
Pennoyer v. *Neff*, 95 U. S. 679.

In the case of *Pennoyer* v. *Neff, supra,* this court in the 8th paragraph of the syllabus, says:

> "The term 'due process of law' when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution to pass upon the subject-matter of the suit; and if that in-

> volves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance."

We submit, therefore, that the statute did not provide for due process of law, nor were the plaintiffs in this case accorded due process of law in this proceeding both for the reason that they had no notice of the time and place and opportunity to be heard; and also that there was no legally constituted tribunal that could hear them. Some suggestion was made in the original hearing of this case that the plaintiffs should have instituted their suit for injunction before this improvement was made, and that by standing by and seeing such improvement going on, with knowledge that they were to be assessed therefor, precluded them from now maintaining this action. This matter, however, was expressly negatived by the plaintiffs in their petition. Allegations of the petition in relation thereto are as follows:

> "Plaintiffs allege that when the work was being constructed and said sewers built that they were under the impression and believed that the same was being built by the defendant city out of the proceeds of the sale of the general bonds of said city issued for that purpose and did not know and did not stand by and see such improvements going in with the knowledge that they were to be assessed therefor, but understood at all times that the same were to be paid for out of

the bond issue voted for such purpose as above alleged. And if they had known or had any notice or knowledge of the intention of the defendant herein to assess the value of said improvement to the property of t h e s e plaintiffs they would have protested and objected thereto during the time that such work was being conducted and that these plaintiffs did not know that a part of the funds voted by the city under the general bond issue, as above stated, had been diverted or squandered for other purposes and did not know that it was the intention to assess them for the value of this improvement until the work was entirely completed and when the defendant attempted to deliver to the contractor bonds therefor; nor had these plaintiffs had any notice of any kind or character either actual or constructive thereof."

It will be observed from this allegation that the plaintiffs thought and understood that this improvement was to be paid for out of the bond issue which had been voted by the entire city for such purpose, and did not know that it was intended to be assessed against them.

Limitation.

If the statute and ordinances above discussed are c o n t r a r y to the provisions of the Fourteenth Amendment to the Constitution of the United States as contended by the plaintiffs in error, the proceed-

ings thereunder are void, and it is well settled that the limitations for bringing an action does not apply in this character of cases when the proceedings are void.

—*Morrow* v. *Barber Asphalt Paving Co.*, 27 Okla. 247.

It will be observed that the Supreme Court of Oklahoma did not decide this case on the question of limitation, but expressly decided it upon constitutional questions herein presented, but we merely call attention to this question of limitations for the reason that it was presented by the defendants in the Supreme Court of Oklahoma as a defense, but as held by that court in the case above cited if the proceedings were void, for the reason that they were unconstitutional, then the statute of limitation has no application.

Conclusion.

In conclusion, we respectfully submit that the Supreme Court of the State of Oklahoma misconstrued the repeated decisions of this court in cases of this character, to the effect that when the area or property to be assessed is left by the legislature of the state to the discretion of local authorities, that the property owner has the right to be heard as to special benefits derived, before his property can be

taken. The question as to whether or not the plaintiffs' property would be benefited by the sewer, whether or not it was so located that it should from a practical standpoint be included in the sewer district, the question as to whether or not his property was not supplied with some other system of sewerage, or included in some other sewer district, and other questions of benefits derived, were ones on which he had a right to be heard; and we also submit that the Supreme Court misconstrued the statutes of the state in holding that the publication of the ordinance creating the district and notice to the contractors to present bids, fulfilled the requirements of due process of law within the meaning of the Federal Constitution. We, therefore, respectfully submit that the cause should be reversed with directions to the District Court of Muskogee County, Oklahoma, to overrule the demurrer of the defendants to the plaintiffs' petition.

Respectfully submitted,

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Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

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No. 360.

In the

Supreme Court of the United States.

October Term, 1918.

W. A. HANCOCK, *et al.*, - - - *Plaintiffs in Error,*

VERSUS

THE CITY OF MUSKOGEE, OKLAHOMA, *et al.*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF DEFENDANTS IN ERROR.

NATHAN A. GIBSON,
JOSEPH L. HULL,
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Attorneys for Defendants in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 360.

W. A. HANCOCK, *et al.*, - - - *Plaintiffs in Error,*

vs.

THE CITY OF MUSKOGEE, OKLAHOMA, *et al.*,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *on* BEHALF *of* DEFENDANTS *in* ERROR.

Statement of the Case.

This action was filed on the 17th day of February, 1916, in the District Court of Muskogee County, Oklahoma, by the plaintiffs in error, who were plaintiffs below, against the City of Muskogee and the duly elected and qualified Commissioners of said City and the City Clerk. The plaintiffs, who were

property owners in a certain sewer district in the City of Muskogee, sought a decree holding the creation of such district to be invalid and enjoining the issuance by the defendants of any evidence of indebtedness or liability against the properties of the several plaintiffs because of said improvement, or from collecting or certifying to the County Treasurer the special assessment levied to pay therefor.

It is alleged in the petition (page 18 of the transcript) that no general sewer system was ever caused to be established in the City as authorized by the Statutes of Oklahoma; that the City, by a certain ordinance, duly passed and approved September 13, 1910, and published on the 16th, 23rd and 30th days of September and the 7th day of October, 1910, pretended to ordain and create a Storm Sewer District No. 12 in the City of Muskogee. The ordinance is set out in full in the petition. That thereafter the City did, on the 17th, 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29th and 30th days of September, 1910, advertise for bids for building a storm sewer in said alleged storm sewer district, the notice for the bids being set forth in full in the petition. (See Tr., p. 21.) They further complain that neither the notice for bids nor the ordinance creating the district, nor in any other proceedings, advertisement or notice were they given an oppor-

tunity to appear and protest against said proceedings, nor given any opportunity whatever of a hearing or expression of any sort in opposition or defense, or as to any corrections or objections, whatsoever. That thereafter, on the 24th day of October, 1910, the Mayor and Council entered into a contract in writing with one E. P. McCormick for the construction of the storm sewer within the alleged storm sewer district and to create and construct several lateral storm sewers in said alleged storm sewer district.

They further allege that under the direction of the Mayor and other employees of the said City the said McCormick has constructed a public or main trunk line sewer and lateral sewers.

The petition further alleges that the City has contracted and agreed with McCormack to pay for the construction thereof by the levying of a special assessment on all the property included within the district aforesaid; and that the City Commissioners on December 31, 1915, by a legal vote, passed and adopted a certain ordinance No. 999, which purported to assess and levy against the property within the above described district, the sum of $56,607.67, being the cost of the construction of said sewer. They allege that neither prior to the passage of the ordinance nor before it was to go into effect, nor at any time either before or after the passage of the same, did they have

an opportunity to appear and protest against the same or object thereto.

It is further claimed that the statutes, under which said sewer district was created, and the assessing ordinance passed by the City, are unconstitutional and void for the reason that at no place therein, either as provided by the statutes of the State or the ordinances of the City of Muskogee, were the plaintiffs or are they at this time afforded an opportunity to protest or object to the proceedings or any part thereof; nor does the law or ordinance provide for any notice of any kind or character to the plaintiffs or others interested in the sewer district.

It is alleged that the defendants were about to execute and deliver to the contractor McCormack certain negotiable bonds evidencing an assessment against the property above named and rendering the same liable to pay for the use of the holders of said bonds the amounts respectively appearing opposite the lots in the petition set forth.

The petition further alleges that the property of the plaintiffs has been listed with the proper officials for taxation for the purpose of paying all the burden of the taxable real estate of the City of Muskogee, including certain taxes to be placed in the sinking fund for the purpose of redeeming bonds voted by the City of Muskogee for the construction of public storm

sewers in said City, one of which sewers now completed is embraced in a district smaller than the district herein, and that no property in the City of Muskogee other than in the District aforementioned has been taxed or threatened to be taxed to pay for the storm sewer in District No. 12. That therefore the plaintiffs will have imposed upon them not only the burden of contributing their share towards the construction of other storm sewers in the City of Muskogee, but they will carry the additional burden of paying for the sewer in District No. 12.

They allege that on October 15, 1908, there was held in the said City an election on a proposed issue of $300,000.00 of bonds by the City for the purpose, as stated in the call for said election, "to construct additional trunk line storm sewers and public sanitary sewers and outlets for the proper drainage of said City;" and that at the said election the bond issue was carried and bonds were afterwards issued and became a lien on all the real estate in the City, including that of the plaintiffs. That the sum of $309,573.30 was realized from the sale of said bonds and was held by the City for the purpose for which it was voted, and it is alleged that such sum was ample for the purpose of intersecting the City with trunk line storm sewers, including that in District No. 12, and for sanitary sewers and outlets for the proper drainage of the City.

That thereafter the Mayor and Council entered into contracts for the construction of certain sewers described in the petition, and the amounts for which were paid out of the proceeds of the bond issue. That on September 12, 1910, the day on which the sewer district herein complained of was created, there was a balance of said fund realized from said bond sale, unexpended and not contracted for, of more than $50,000.00, and it is claimed that this balance was sufficient to build the storm sewer in District No. 12. They allege that when the work was being constructed and said sewer built they were under the impression and believed that the same was being built by the City out of the proceeds from the sale of the bonds of the City issued for that purpose, and did not know and did not stand by and see such improvements going in with the knowledge that they were to be assessed therefor, but understood at all times that the same were to be paid for out of the bond issue voted for such purpose as above alleged; and if they had known of the intention of the defendant to assess their property for the payment of said improvements, they would have protested and objected thereto during the time such work was being conducted.

The defendants filed a general demurrer (see Tr., p. 55), and upon hearing thereon the demurrer was sustained. The plaintiffs electing to stand upon

their petition, judgment was rendered against them. (See p. 56.) Upon appeal to the Supreme Court of Oklahoma the judgment was affirmed. (See p. 62.)

ARGUMENT.

The City Council having acted in a legislative capacity in determining what property should be included within the sewer district, and the assessment having been made in accordance with a fixed rule adopted by legislative act, notice was unnecessary to constitute due process of law.

It will be noticed that the statute, under which the City of Muskogee acted in creating this sewer district (quoted in plaintiffs in error's brief at pages 33 to 39, inclusive), provides in substance as follows:

That district sewers may be established within limits of districts to be prescribed by ordinance and that such districts may be subdivided, enlarged or changed by ordinance at any time previous to construction of the sewer, and more than one district sewer may be laid in a sewer district if deemed necessary by the Council for sanitary or other purposes.

—Section 986, Snider's Compiled Laws, 1909.

Whenever the Mayor and Council deem such district sewer necessary they may proceed with the

work, causing specifications, etc., to be prepared with complete estimate of the cost. They are given power to adopt any material or methods for construction, and upon completion of plans and specifications they are required to advertise for sealed bids for at least ten days, if published in a daily newspaper, and at least two weeks, if the same is published in a weekly newspaper, and at the time and place specified in the notice the contract shall be awarded to the lowest responsible bidder for the work, in no case to exceed the estimated cost. (Section 989, *Idem.)* Upon completion of the sewer the City Engineer or other officer having charge of the work shall compute the whole cost thereon, including all other expenses incurred by the City in addition to the contract price of the work, and shall apportion the same against all the lots or pieces of ground in such districts, exclusive of the improvements, in proportion to the area of the whole district, exclusive of the public highway, and report the same to the Mayor and Council, who shall thereupon levy and assess a special tax by ordinance against each lot or piece of ground within the district. This ordinance is required to be published in a newspaper within the City for four consecutive weeks, and if the amount named be not then paid, the Mayor and Council shall cause tax warrants to be issued against such lots, which recite

that the amount of the assessment will be levied against the property in three equal installments with interest, due on the 15th of December, next after each such levy. (Section 990, *Idem.)* Provision is also made for the levy annually for three years of a sufficient sum to discharge the maturing installment on each particular tract, and for certifying same to the County Clerk to be collected as other taxes.

It is established beyond controversy by the decisions of this court that the legislative power may determine the amount to be assessed for a given improvement and designate the lands and property benefitted thereby upon which assessment is to be made without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.

—*Wagner* v. *Leser,*
239 U. S. 207, 60 L. ed. 230;
Spencer v. *Merchant,*
125 U. S. 345, 31 L. ed. 763;
French v. *Barber Asphalt Paving Co.,*
181 U. S. 324, 45 L. ed. 879;
Shumate v. *Heman,*
181 U. S. 402, 45 L. ed. 922.

In *Wagner* v. *Leser, supra,* this court, after a careful review of the authorities, says:

> "Taking the decisions of this court together we think that it results that the legislature of a state may determine the amount to be assessed for a given improvement, and designate the lands and property benefitted thereby upon which assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred."

It is, however, claimed by the plaintiffs in error that when the legislature delegates the authority to determine what property shall be included within the sewer district, even though delegated to the legislative body of a municipal corporation, it converts the power to be exercised from a legislative to a quasi-judicial power, and therefore, requires notice to be given and opportunity to be heard. This, however, is not sustained by the authorities, and this court has held to the contrary in cases where this question has been before it.

In the case of *Paulsen* v. *City of Portland*, 149 U. S. 30, 37 L. ed. 637, the Common Council of the City of Portland passed an ordinance providing for the construction of a sewer in a part of the City. The validity of the assessing ordinance was challenged by lot owners in the sewer district upon the ground that the ordinance was unconstitutional and void, "as it determines arbitrarily and absolutely

that the property therein described is benefitted by said Tanner Creek sewer, without giving to the owners of said property any notice or opportunity to be heard upon that question."

In answering this Mr. Justice BREWER for the court said:

> "By Ordinance 5068 it (the City) ordered the construction of a sewer and directed what area should be drained into that sewer and created a taxing district out of the area. For these no notice or assent by the taxpayer was necessary. A sewer is constructed in the exercise of police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So also the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 81 U. S. 14 Wall. 676; *Spencer* v. *Merchant*, 125 U. S. 345-355."

The court in that case also answered the contention made here that the statute authorizing the creation of this sewer district was invalid because providing for no notice, saying:

> "The city is a miniature state, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and

the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council."

It is pointed out by the Supreme Court of Oklahoma, in the case of

City of Perry v. *Davis*,
18 Okla. 427, 90 Pac. 865,

that the statute attacked in this case was, with but slight modifications, not affecting the questions under consideration, taken from the State of Missouri, and was considered by the Supreme Court of that state in the case of

Heman v. *Allen*,
156 Mo. 534, 57 S. W. 559,

affirmed by this court on appeal and reported under the name of

Shumate v. *Heman*,
181 U. S. 402, 45 L. ed. 922.

In that case it was contended that the provision of the City Charter of St. Louis, providing for the sewer tax to be assessed without regard to the question of corresponding benefits, and without notice of hearing and opportunity to contest the existence of benefit to their property, was in violation of the due process of law clause of the constitution. But the Missouri court overruled the contention, stating:

"No notice was required to be given to the defendant of the passage of the ordinance or

the assessment before issuing of the tax bill, and none was necessary."

On appeal to this court the decision below was affirmed, the court saying:

> "The only questions which are open to our consideration upon this record is the contention of the plaintiff in error that the provisions of the charter of the City of St. Louis, the ordinance of the municipal assembly, the contract which the defendant in error made thereunder, and the assessments against the property of the plaintiff in error for the cost of the construction of said sewer, were null and void and of no effect for the reason that they were repugnant to the Fourteenth Amendment to the Constitution of the United States. This contention has been determined under a similar state of facts by this court in the recent case of *French* v. *Barber Asphalt Company,* 181 U. S. 324, in error to the Supreme Court of the State of Missouri, and upon the authority of that case the judgment of the Supreme Court is affirmed."

In the recent case of *Withnell* v. *Ruecking Construction Company*, decided by this court March 3, 1919, and reported in U. S. Adv. Ops. 1918-1919, page 274, a local assessment for a street improvement, made in accordance with a fixed rule of the Charter of the City of St. Louis, Missouri, which was adopted by a vote of the people, under a state constitutional authority, was held to be legislative in

character and required no preliminary hearing as to the nature and extent of benefits in order to maintain its constitutional validity.

These authorities, it seems to us, clearly establish the fact that the Mayor and Council of the City of Muskogee, the legislative body of the municipality, acted in a legislative capacity in creating the sewer district involved in this action, and that notice thereof was not required to be given to property owners.

The decisions relied upon by the plaintiffs in error, which hold that where the authority to determine what lands are to be benefitted by an improvement is delegated to Commissioners, assessors, or any other such administrative officials, then notice is required, are not in point. It is manifest that in such cases Commissioners act in a quasi-judicial capacity to determine the judicial inquiry as to whether or not the lands are benefitted; but the common council of a municipal corporation is vested with a part of the legislative authority of the state, and when the authority is delegated to it by the legislature to determine such matters, it must be deemed to have acted in a legislative capacity rather than a judicial capacity, and therefore the requirement of notice is dispensed with.

The Supreme Court of Oklahoma, in the case of *City of Perry* v. *Davis, supra,* said:

"Under our system the power of taxation is vested exclusively in the legislative branch of the Government, but it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of public affairs. When such a corporation is created, it becomes vested with the power of taxation to sustain itself, with all necessary public improvements, unless the exercise of that power be expressly prohibited. That the Mayor and Council of the City of Perry was authorized to establish and construct a necessary sewer system for the City, in the absence of the necessary prohibitive statutes, should not be questioned. The power to establish and construct a sewer system carried with it the power to create an indebtedness and taxation for its payment."

Nor were the plaintiffs entitled to notice and opportunity to be heard as to the amount to be assessed against the property. The act of the legislature, giving authority to the city to create sewer districts, itself provides a definite rule for ascertaining the amount to be assessed against each lot; that is, by the proportion it bears in area to the entire area of the district, excluding the public highway. The determination of this was a mere mathematical problem, and was not a judicial question. As said in the case of *Withnell* v. *Ruecking Construction Company, supra:*

> "When the assessment is made in accordance with a fixed rule adopted by a legislative act, a property owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred."

And in *Wagner* v. *Leser, supra,* it was held that where the legislative act prescribed the front foot rule for assessment, notice and hearing as to the amount and extent of benefits conferred was not essential to the validity of the act.

We conclude, therefore, from the authorities cited that a requirement for notice was not essential to the validity of either the act of the legislature authorizing the City Council to create the district and to assess the cost according to area, nor was it necessary to the validity of the ordinances passed in the exercise of this power.

If Notice Were Necessary, However, Sufficient Notice Was Provided by This Act.

The act in question was first attacked before the Supreme Court of Oklahoma in the case of *City of Perry* v. *Davis, supra,* and in that case the court held that sufficient notice was given under the act by the City of Perry, if notice were required. This notice was found, it was said:

First, in the publication of the ordinance creating the district. This ordinance was required to be published by the general act, providing that all ordinances of cities should become effective only after publication, and this ordinance describes the boundaries of the district, the kind of sewer, with its intersecting and connecting points, to be built, directs the City Engineer to prepare his specifications and estimated cost, and that when so presented and approved the City Clerk shall advertise for sealed bids;

Second, in the publication for a period of ten days in a daily newspaper in the City of Perry of the notice for bids for the construction of the sewer;

Third, in the publication for four consecutive weeks in a newspaper of general circulation of the City of Perry of the assessing ordinance.

This notice, the court held, was sufficient notice to the owners of the property. It is to be noted that in the proceedings attacked in this case all of the publications therein described were had.

As said by the Supreme Court of the state in its opinion herein:

> "Practically all the sewer systems in all the cities in this state were constructed under the same act, and the construction placed thereon in the *City of Perry* v. *Davis, supra,* has been

accepted as final by the bench and bar of Oklahoma as a territory and as a state for a great many years. Under the construction placed upon the act, the publication of the ordinance of necessity has been deemed sufficient notice to the property owners of all the facts therein contained, and injunction or other proceedings in the ordinary courts of general jurisdiction have been deemed to be their remedy if they have any complaints or objections to make to the validity of the proceeding under which the publication for the improvement is made. Neither the act itself nor the decision of the court fixes any specific time within which complaints or objections may be filed. But the decision unquestionably holds that the act under which the improvement was made constitutes due process of law; that the passage and publication of the ordinance of necessity in pursuance of the act constitutes notice and confers jurisdiction upon the city authorities to perform the work and provide for the payment therefor." (Tr., p. 64.)

See also:

City of Muskogee v. *Rambo*,
40 Okla. 672, 138 Pac. 567;

City of Coalgate v. *Gentilini*,
51 Okla. 552, 152 Pac. 95.

The plaintiffs in error have waived by their conduct the right to question the validity of the ordinances creating Sewer District No. 12 and assessing their property for the payment of the cost of construction of the sewer.

But there is another complete answer to this suit which makes it unnecessary in our opinion to consider the question of whether or not the statute providing for sewer districts is constitutional. The petition in this case showed that the ordinance creating the sewer district was passed September 12, 1910, and approved September 13, 1910, and published on the 12th, 23rd and 30the days of September, and on the 7th day of October, 1910. It shows further that the City of Muskogee, pursuant thereto, entered into a contract with F. P. McCormick for the construction of a sewer. That the sewer was constructed as provided by said contract, and that the ordinance assessing the property was passed on December 3, 1915. This action was commenced on the 17th day of February, 1916.

In the case of *City of Coalgate* v. *Gentilini*, 51 Okla. 552, 152 Pac. 95, a sewer assessment case, the court said:

> "The ordinance could have been challenged by a referendum vote. But this was not done. The legality of the proceedings under the ordi-

> nance could have been challenged in a court of competent jurisdiction before any outlay was made, and before there was any change in the conditions or relations of the property or the parties. But this was not done. And since the defendant in error took advantage of none of the means at its hands to prevent this outlay of money for public improvements tending to benefit his property can he now in a court of equity be heard to say that since he has the improvements he will not pay the price? We think not. Equity aids only the diligent; and in *Speidell* v. *Henrici*, 120 U. S. 377, 387, Mr. Justice GRAY in speaking of the functions of a court of equity said: 'Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and negligence are always discountenanced'."

And see *City of Muskogee* v. *Rambo*, *supra*, where the principle was applied to an attack made by property owners *upon the same sewer district which is alleged to have been unlawfully created in the case at bar.*

See also:

City of Perry v. *Davis*, *supra;*

City of Bartlesville v. *Holm*,
40 Okla. 467, 139 Pac. 273;

Norris v. *City of Lawton*,
47 Okla. 213, 148 Pac. 123;

City of Norman v. *Allen*,
47 Okla. 74, 147 Pac. 1002;

Goodhome & Sparrow Investment Co. v. *Cleveland Trinidad Paving Company,* 48 Okla. 38, 150 Pac. 109.

In this case it would be manifestly unjust to permit the plaintiffs in error to enjoy the benefits of the construction of this sewer—sitting silently by while the work is being done and making no objections thereto—and to enjoin the delivery of the warrants to the contractor by which payment therefor was to be made.

It is attempted by the plaintiffs, however, in their petition to avoid this estoppel by the allegation to the effect that there had previously been a bond issue for the purpose of constructing storm sewers in the City of Muskogee amounting to $300,000.00 and that a portion of that fund remained in the treasury unexpended at the time of the passage of the ordinance creating Sewer District No. 12, and that plaintiffs thought that the storm sewer built in Sewer District No. 12 was to be paid for out of that fund. But it is not alleged that there was any reason for such impression on the part of the plaintiffs except the fact that such a bond issue had been previously voted. They were not mislead into believing that this sewer was to be paid for out of those funds, and, apparently, they made no inquiry to learn who was to bear the expense of this construction. It is respectfully

submitted that these facts are not sufficient to relieve plaintiffs from the estoppel. It was the duty of the plaintiffs to inquire as to how these improvements were to be paid for upon learning that they were to be made. Their negligence in assuming that it was to be paid for out of a bond issue cannot be relied upon by them to excuse their delay in taking action.

In the case of *Kerker* v. *Bocker*, 20 Okla. 729, 95 Pac. 981, 994, Mr. Chief Justice WILLIAMS defines the obligations of citizens in the modern municipality as follows:

> "Every person as a member of a municipal community, thereby enjoying the incidental benefits, takes notice of the accompanying obligations. Streets are to be laid out, graded, paved and lighted. The constabulary must be maintained to enfore peace and preserve order. Sewerage systems and water supplies must be provided. No one is entitled to enjoy these advantages and to be permitted to successfully contend that the laws, ordinances, and resolutions under which such benefits and advantages are created, regulated, and controlled, are invalid, and thereby escape the resultant burdens. The citizen of the modern municipality and property owner thereof take notice of such necessities. He owes his personal service to maintain order and promote the public good in his municipality, just as he owes to the n a t i o n his service to protect against hostile encroachments and invasion. No man can expect to have property in the cities,

> abutting on public thoroughfares and streets, without bearing the burdens of special taxation to maintain grades, build sidewalks, and macadamize and pave the streets; and he acquires his property with the full knowledge of the fact that the legislative power of the state can be exercised to levy and provide an assessment or special tax for such improvements."

In *Shepard* v. *Barron*, 194 U. S. 553, 48 L. ed. 1115, 1121, the Supreme Court of the United States says:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up."

And it explains this in the words of the Chief Justice, quoting from *O'Brien* v. *Wheelock:*

> "This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced."

We call the court's attention to the fact that no complaint is made by the plaintiffs in this case that they did not receive the full consideration, nor is it

contended that the lots were not benefited by the storm sewers, or that the assessment is in excess of the reasonable benefit derived therefrom. We respectfully submit that the case is one which in no way appeals to the conscience and one in which a court of equity should be slow to grant relief.

Respectfully submitted,

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HANCOCK ET AL. *v.* CITY OF MUSKOGEE, OKLAHOMA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 360. Submitted April 30, 1919.—Decided June 9, 1919.

Due process of law does not require that the owners of property to be assessed for a local sewer improvement shall be notified in advance of the formation and bounds of the improvement district, when this is established by the legislature directly or by a municipality to which full legislative power over the subject has been delegated by the State. P. 455.

The case is different when the district is established by a board or other inferior tribunal exercising only administrative or *quasi*-judicial authority. P. 458.

When the legislature itself prescribes that the cost of such an improvement shall be apportioned against the lots in the district in proportion to area, there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned. *Id.*

How much of such cost shall be specially taxed to the property benefited, and whether the distribution shall be according to benefits to particular lots or according to frontage, values or area, are matters of legislative discretion, subject to judicial relief in cases of abuse or error in execution. P. 459.

168 Pac. Rep. 445, affirmed.

THE case is stated in the opinion.

Mr. Benjamin B. Blakeney, Mr. J. Harvey Maxey, Mr. Grant Foreman and *Mr. James D. Simms* for plaintiffs in error.

Mr. Nathan A. Gibson and *Mr. Joseph L. Hull* for defendants in error. *Mr. Thomas L. Gibson* was on the brief.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiffs in error, owners of real estate in the City of Muskogee, brought suit in an Oklahoma state court seeking an injunction to restrain the city and its officials from encumbering their lands with a special assessment to pay for the construction of a sewer in Sewer District No. 12 of that city; contending that the statutes of the State and the ordinances of the city under which the district was created and the cost of the sewers therein assessed against the property within the district were in violation of the Fourteenth Amendment, in that they deprived plaintiffs of their property without due process of law. The trial court refused relief, the Supreme Court of Oklahoma affirmed its judgment (168 Pac. Rep. 445), and the case comes here by writ of error.

The statutes, as they existed at the time the proceedings in question were had, are to be found in Snyder's Comp. Laws Okla. 1909, §§ 984–993. They authorize the mayor and councilmen in any municipal corporation having a population of not less than 1,000 to establish a general sewer system composed of public, district, and private sewers, and also to cause district sewers to be constructed within districts having limits prescribed by ordinance; the cost of district sewers to be apportioned against all lots and pieces of ground in the district in proportion to area, disregarding improvements and excluding the public highways.

It is contended that the statute is void because it gives no notice to property owners and makes no provision for hearing them as to the formation of the district or its boundaries, the proposed plan or method of building the sewer, or the amount to be assessed upon property in the district. While it is conceded to have been established by previous decisions of this court that, where the legislature

fixes by law the area of a sewer district or the property which is to be assessed, no advance notice to the property owner of such legislative action is necessary in order to constitute due process of law, it is insisted that in the present case the legislature has not done this, and hence it is essential to the protection of the fundamental rights of the property owner that at some stage of the proceeding he have notice and an opportunity to be heard upon the question whether his property is erroneously included in the sewer district because it cannot be benefited by the sewer, or for any other reason is improperly subjected to assessment.

But we find it to be settled by decisions of the Supreme Court of Oklahoma, which as to this are conclusive upon us, that in respect to the establishment and construction of local sewer systems and the exercise of the power of taxation in aid of this purpose, the entire legislative power of the State has been delegated to the municipalities. In *City of Perry* v. *Davis*, 18 Oklahoma, 427, referring to this same legislation the court held (p. 445): "When the legislature delegated the power to the mayor and councilmen of municipal corporations in this territory, having a *bona fide* population of not less than one thousand (1,000) persons, to establish a general sewer system, that delegation of power carried with it all the incidental powers necessary to carry its object into effect within the law. Of what utility would such a grant of power be if unaccompanied with sufficient power to carry it into effect? Under our system the power of taxation is vested exclusively in the legislative branch of the government but it is a power that may be delegated by the legislature to municipal corporations which are mere instrumentalities of the state for the better administration of public affairs. When such a corporation is created it becomes vested with the power of taxation to sustain itself with all necessary public improvements, unless the exercise of that

power be expressly prohibited. That the mayor and council of the city of Perry was authorized to establish and construct a necessary sewer system for the city, in the absence of prohibitive statutes, should not be questioned. The power to establish and construct a sewer system carried with it the power to create indebtedness and taxation for its payment." The court further held that the act constituted due process, and that the passage and publication of an ordinance establishing a sewer district constituted sufficient notice and conferred jurisdiction upon the city authorities to perform the work and provide payment therefor. This was followed in *City of Muskogee* v. *Rambo*, 40 Oklahoma, 672, 680, and also in the present case.

So far, therefore, as the present ordinance determined that a district sewer should be constructed, and established the bounds of the district for the purpose of determining what property should be subjected to the special cost of constructing it, there was an authorized exercise of the legislative power of the State, which, according to repeated decisions of this court, was not wanting in due process of law because of the mere fact that there was no previous notice to the property owners or opportunity to be heard. The question of distributing or apportioning the burden of the cost among the particular property owners is another matter. *Spencer* v. *Merchant*, 125 U. S. 345, 355-357; *Paulsen* v. *Portland*, 149 U. S. 30, 40; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 343; *Shumate* v. *Heman*, 181 U. S. 402, affirming *Heman* v. *Allen*, 156 Missouri, 534; *Wagner* v. *Baltimore*, 239 U. S. 207, 218; *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63.

We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power, or some denial of the equal protection of the laws in the method of exercising it,

judicial relief would not be accorded to parties aggrieved. The facts of this case raise no such question. See *Wagner* v. *Baltimore*, 239 U. S. 207, 220; *Houck* v. *Little River Drainage District*, 239 U. S. 254, 265; *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, 485; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 59.

The chief reliance of plaintiffs in error is upon those decisions which have held that where the legislature, instead of determining for itself what lands shall be included in a district or what lands will be benefited by the construction of a sewer, submits the question to some board or other inferior tribunal with administrative or *quasi*-judicial authority, the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 166-167, 174–175; *Parsons* v. *District of Columbia*, 170 U. S. 45, 52; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 247. But they have no application to a case where, as in the case before us, full legislative power over the subject-matter has been conferred by the State upon a municipal corporation. Where that has been done, a legislative determination by the local legislative body is of the same effect as though made by the general legislature. *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63, 70.

It is suggested further that the statutes and ordinances in question were wanting in due process, in that they afforded the property owner no opportunity to be heard as to the distribution of the cost of the sewer among the different properties in the district or the ascertainment of the amount of the assessment to be imposed upon the lands of plaintiffs in error. Respecting this, it is sufficient to say that as the legislature itself has prescribed that the entire cost of a district sewer shall be apportioned against the lots in the district in proportion to area (excluding

the highways), there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned, since this is resolved into a mere mathematical calculation. And it is settled by the cases above cited that whether the entire amount or a part only of the cost of a local improvement shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots or apportioned according to their frontage upon the streets, their values, or their area, is a matter of legislative discretion, subject, of course, to judicial relief in cases of actual abuse of power or of substantial error in executing it, neither of which is here asserted.

Judgment affirmed.